Petition

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SUPREME COURT U.S.

No. 81 5578

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES BREWER,

Petitioner

- v -

STATE OF INDIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF INDIANA

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QUESTIONS PRESENTED

1) Does the Indiana Death Penalty Statute violate the Eighth or Fourteenth Amendments to the Constitution of the United States because it allows the imposition of a death sentence on an accomplice in an armed robbery where a death has resulted without charging that the accomplice was the murderer.

2) Does the Indiana Death Penalty procedure which provides for an Appellate review on a "manifestly unreasonable in light of the nature of the offense and the character of the offender" comply with the mandates as established by the United States Supreme Court in Gregg and Proffitt, that there be an appellate review that the death sentence was not disproportionate and consistent with other sentences imposed in similar circumstances.

3) Was the Indiana Supreme Court's use of a "mockery of justice" standard to review a claim of ineffective counsel in a death penalty case proper? Was James Brewer afforded effective representation of counsel at his sentencing stage when his counsel failed to prepare for sentencing; failed to move for a continuance; failed to produce medical records that showed Brewer was easily lead; placed Brewer on the witness stand to admit the presenting of perjured alibi evidence; failed to object to cross-examination of Brewer; and allowed the trial court to instruct on good time credit without Brewer being present?

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, James Brewer, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana in this case.

CITATION OF OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at ___Ind.___, 417 N.E.2d 889 (1981) and is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Supreme Court of Indiana was entered on March 6, 1981. A timely Petition for Rehearing was filed and was denied on August 19, 1981. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "(N)or shall any state deprive any person of life, liberty, or property, without due process of law. . ."

and the Sixth Amendment to the Constitution of the United States which provides:

> "In all criminal prosecutions, the accused shall have the right. . . to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

On January 20, 1978, James Brewer and Kenny Ray Brooks were indicted in Lake County, Indiana, with the offense of murder which grew out of an armed robbery and killing that took place on December 4, 1977.

The indictment charged that Kenneth Ray Brooks and James Brewer "did then and there unlawfully, feloniously, knowingly, or intentionally kill and murder another human being, . . . by . . . shooting. . . with a . . . pistol, and the said pistol was then and there had and held in the hands of said Kenneth Ray Brooks and James Brewer. . . ." Tran. p. 15. Brewer was appointed pauper counsel and his trial began on February 14, 1978. The evidence disclosed that two men were involved in an armed robbery during which a person was shot and killed by one of the robbers. The jury was given a standard accomplice instruction:

> It is a fundamental principle of law that where two or more persons engage in a commission of an unlawful act, each person is criminally responsible for the actions of each other committed in the execution of a common design or plan even though not intended as part of the original design or plan. It is not essential that participation of any one person to each element of the crime be established. Tran. p. 47.

After deliberation the jury returned a verdict of guilty on February 17, 1978.

On February 18, 1978, the jury reconvened for the sentencing stage. The jury was instructed that it could consider the fact that the murder was committed during the perpetration of

an armed robbery as an aggravating factor warranting the imposition of the death penalty under Indiana law. Indiana Code §35-50-2-9, Appendix A, pp. 6-7. At the sentencing stage James Brewer's court-appointed counsel failed to investigate the mental history of James Brewer. At the sentencing stage counsel failed to present existing medical records that show James Brewer was "mentally deficient, mild, with diffuse brain damage." James Brewer had in fact received shock treatments for his mental condition. As a young boy in Indiana Boys' School he was diagnosed as a "mentally deficient youth and responds well to the controls here at Boys' School." Evidence was available that Brewer was easily led or controlled by others. Under Indiana law such evidence was admissible in mitigation.

At the sentencing stage in James Brewer's case, counsel placed James Brewer on the witness stand and had him admit that he participated in the armed robbery and thus the alibi testimony presented by other witnesses during the trial was perjured. Such alibi testimony was known to court-appointed counsel to be false prior to its presentation. Court-appointed counsel had James Brewer testify that he was at the scene of the armed robbery but that his companion, Kenny Brooks, did the shooting. Evidence was also presented that Brewer was under the influence of drugs on the night in question.

The jury returned a recommendation of the death penalty for James Brewer.

On March 1, 1978, the trial court conducted a review of the imposition of the death penalty and affirmed the imposition of the death penalty on James Brewer. Kenneth Ray Brooks received a 60 year sentence on a guilty plea to murder.

A direct appeal was taken to the Indiana Supreme Court and on March 6, 1981, the Indiana Supreme Court rendered an opinion affirming the imposition of the death penalty.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1) At the trial level and on appeal to the Supreme Court of Indiana, Petitioner argued that his sentence of death was unconstitutionally excessive and disproportionate under the Eighth Amendment because he was not tried as the triggerman but as an accomplice in an armed robbery during which a victim was killed. Brewer's Belated Motion to Correct Errors and Brief of Defendant-Appellant, in Indiana Supreme Court, pages 70-77.

In its opinion affirming Petitioner's sentence of death, the Indiana Supreme Court rejected this claim by several statements throughout its opinion. The Indiana Supreme Court stated:

> (A)n offense is committed whenever one intentionally or knowingly aids, induces or causes that offense to be committed. We have held in similar circumstances that concerted action or participation in a crime is sufficient for this purpose.
> 417 N.E.2d at 893, Appendix A, p. 5.

> Accessories are guilty of the same crimes as are their principals. We, therefore, perceive of no reason why it should be ipso facto inappropriate to subject them to the same penalties.
> Historically, we have imposed death sentences upon aiders and abettors to both intentional murders and felony murders.
> 417 N.E.2d at 904, Appendix A, p. 16.

> (T)he constitutions do permit the imposition of death penalty, notwithstanding that the conviction is based upon a theory of vicarious liability.
> 417 N.E.2d at 905, Appendix A, p. 17.

2) Also on appeal to the Supreme Court of Indiana, Petitioner argued that the Indiana Supreme Court rules for review of death sentences failed to comply with the requirements as set forth by the United States Supreme Court in Gregg, Proffitt and Jurek. See Belated Motion to Correct Errors and Brief of Defendant-Appellant, pages 77-82. The Indiana Supreme Court rules of review provide for the reversal of a sentence only if it is "manifestly unreasonable" under the circumstances. The Indiana Supreme Court responded to Petitioner's argument by stating that its "manifest unreasonableness" standard of penalty review is "no different from the recent dictates of the United States

Supreme Court." See 417 N.E.2d at 900, Appendix A, p. 12. Yet in reviewing the record in the Petitioner's case, the Indiana Supreme Court simply determined that the death sentence was warranted by the nature of the offense and the character of the defendant. 417 N.E.2d at 903, Appendix A, p. 15. The Indiana Supreme Court did not compare Petitioner's case to other felony murder cases in the State of Indiana to determine whether the death penalty had been imposed in similar cases. Furthermore, there was no review of the triggerman's (Kenny Brooks') sixty year sentence. 417 N.E.2d at 909, Appendix A, p. 21.

3) At the trial level and on appeal to the Supreme Court of Indiana, Petitioner argued that the representation given to him at the sentencing stage by his court-appointed counsel was in violation of the Sixth Amendment to the Constitution. See Belated Motion to Correct Errors and Brief of Defendant-Appellant, pages 129-140. Brewer argued several instances of ineffective assistance of counsel, including failure to properly investigate for the sentencing stage, failure to present evidence that James Brewer was easily led by other people, failure to produce evidence of his mental deficiency and brain damage, failure to present medical records showing his mental deficiencies, allowing Brewer to take the witness stand and admit the presentation of perjured testimony to the jury, not moving on the record for a continuance of the sentencing, and allowing a good time credit instruction to be given to the jury outside the presence of the defendant.

The Indiana Supreme Court applied a "mockery of justice" test and relied upon the presumption of competency in denying Brewer's claim that his Sixth Amendment Right to counsel was violated. Also, the court commented that Brewer had failed to show how he had been prejudiced by counsel's ineffectiveness. 417 N.E.2d at 907, Appendix A, p. 19.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION OF THE DEATH PENALTY ON AN ACCOMPLICE IN AN ARMED ROBBERY WHERE A DEATH HAS RESULTED WITHOUT A CHARGE THAT THE ACCOMPLICE WAS THE MURDERER VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

James Brewer and Kenneth Ray Brooks were both indicted in the Lake Superior Court in January of 1978 and were charged jointly in Count I with knowingly or intentionally killing Steven Skirpan by shooting him with a pistol. In Count II of the indictment Brewer and Brooks were charged in traditional felony murder language. Brewer was permitted to go to trial on Count I and the evidence showed that he and another person committed an armed robbery in Gary, Indiana, during which Steve Skirpan was shot and killed. Both participants in the armed robbery had been charged with the murder and during Brewer's trial the jury was instructed:

> It is a fundamental principle of law that where two or more persons engage in the commission of an unlawful act, each person is criminally responsible for the actions of each other committed in the execution of a common design or plan even though not intended as part of the original design or plan. It is not essential that participation of any one person to each element of the crime be established. Tran. p. 47.

It is petitioner's position that such an instruction directly authorizes a jury to return a verdict of murder even if James Brewer was not shown to have been the triggerman. The record clearly discloses that this prosecution was based upon the usual felony murder approach; if the jury found that James Brewer was one of the two armed robbers then he could be found guilty of murder regardless of whether he did the actual shooting. Brewer was not charged with being an accomplice in a planned murder - his culpability was his participation in the armed robbery.

James Brewer argued in his appeal to the Indiana Supreme Court that the imposition of the death penalty on an accomplice in

an armed robbery, who had no plan to kill, would not be an effective deterrent to such murders because there was no plan to kill. Justice Marshall's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978) stated that the imposition of the death penalty for a non-triggerman in a felony murder situation was in violation of the Eighth Amendment. The Indiana Supreme Court has taken a strong position opposite to Justice Marshall's opinion in Lockett. The Indiana Supreme Court stated:

> The defendant's argument that execution of an accessory who has no intention to murder and, in fact, did not personally commit the murder, can have no deterrent effect as to such murders is unpersuasive. If the commission of violent crimes can, in fact, be deterred by the rational infliction of the death penalty, reason requires that the program be administered in such manner as will deter all those who have a penchant to participate in violent crimes. This, in turn, dictates that those who participate, in a significant way, be eligible for selection to serve as examples.
> 417 N.E.2d at 905, Appendix A, p. 17.

The idea that a random execution of persons to serve as an example to people who engage in violent crimes in which killings occur runs against the tenor of recent United States Supreme Court decisions. Analysis of the Court's death penalty cases after Furman indicates that death is an appropriate penalty in a case reflecting "moral outrage" against the offender's crime or if "the only adequate response may be the penalty of death." Gregg v. Georgia, 428 U.S. 153, 183, 184 (1976). If the imposition of the death penalty is to be a deterrent effect for "carefully contemplated murders" or where "other sanctions may not be adequate" common sense says that the use of the death penalty against a non-triggerman who does not intend to kill will not reduce the incidents of murder. Gregg v. Georgia, 428 U.S. at 186. This Court in Gregg clearly stated that the penalty of death was not per se excessive or disproportionate where "a life has been taken deliberately by the offender." 428 U.S. at 187. The death penalty has been held "an excessive penalty for rapist who, as such, does not take human life." Coker v. Georgia, 433 U.S.

584, 598 (1977).

Gregg and Coker strongly suggest that it is disproportionate and thus unconstitutional for the State to impose the death penalty on an offender who has not deliberately taken a life. Lockett v. Ohio, 438 U.S. at 627-28 (White, J. concurring).

In the State of Indiana various death penalty cases have made their way to the Indiana Supreme Court since 1971. The death penalty was imposed only in cases of intentional killings by the individual sentenced to death. In Adams v. State, 259 Ind. 64, 271 N. E.2d 425 (1971), Adams pulled up behind a couple parked on a rural road and shot the man and raped the woman. The death penalty was set aside because of Furman. Adams v. State, 259 Ind. 162, 285 N.E.2d 757 (1972). In French v. State, 266 Ind. 276, 362 N.E.2d 834 (1977), French engaged in an armed robbery and as he left he took a girl with him. He and his companion raped the girl, beat her and finally held her head under water until she drowned. In Fair v. State, 266 Ind. 380, 364 N.E.2d 1007 (1977), Fair walked into a methadon clinic in South Bend and pulled a gun firing several shots killing two people. In Lamar v. State, 266 Ind. 689, 266 N.E.2d 652 (1977), Lamar shotgunned his victim as she left her car after lying in wait. In Gladdis v. State, 267 Ind. 100, 316 N.E.2d 244 (1977), Gladdis robbed a grocery store in Crawfordsville and when stopped during his escape he killed a police officer by shooting him three times. In Murphy v. State, 267 Ind. 184, 369 N.E.2d 411 (1977), Murphy and a companion kidnapped a mother and her nine year old son, they were taken to a wooded area and were shot to death by Murphy and his companion. In Bond v. State, 403 N.E.2d 812 (Ind. 1980), Bond picked up two hitchhikers eventually taking them into the woods and shooting them. In Norton v. State, 408 N.E.2d 514 (Ind. 1980), Norton hired the killing of his wife and child. These cases show, that in recent years, the death penalty has only been imposed for intentional killings. Note that all of these death penalty cases

were vacated because of the United States Supreme Court decisions.

In this case the Indiana Supreme Court, by its own admission, has allowed the death penalty to be imposed as an example to those who would participate in violent crimes. Random executions to deter violent crime are not constitutionally permissible. Furman v. Georgia, 428 U.S. 238, 309-310 (1972).

II

THE COURT SHOULD GRANT CERTIORARI TO REVIEW INDIANA'S APPELLATE REVIEW PROCEDURES IN A DEATH PENALTY CASE BECAUSE THE USE OF A "MANIFESTLY UNREASONABLE" CRITERION VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

The Indiana Death Penalty Statute is unconstitutional because the Appellate Rules for review of death sentences fail to comply with the mandates of the United States Supreme Court in Gregg and Proffitt. Indiana Code 35-50-2-9(h) requires automatic appellate review under rules to be adopted by the Indiana Supreme Court. See Appendix A, p. 7. The Indiana Supreme Court adopted rules of review of sentences effective January 1, 1978, that were used in this case. Rule No. 2 reads as follows:

> Scope of Review.
> (1) The reviewing court would not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.
>
> (2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed.

First, Brewer argues that this statutory scheme of review of death penalty cases is in direct violation of current United States Supreme Court decisions because there is no comparison with other cases. In Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court upheld a statutory procedure in Goergia in which the Supreme Court of Georgia compared each death sentence with sentences imposed upon similarly situated defendants. The purpose of this comparison was to ensure that the sentence of death in a particular case was not disproportionate. 428 U.S.

at 198. The United States Supreme Court acknowledged that in accordance with Furman, the Georgia procedures established a "meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not." 428 U.S. at 198, quoting from Furman. In Gregg, the United States Supreme Court also noted that the appellate review function in Georgia served to determine if 1) the death penalty was imposed only rarely for the act, and 2) if it was substantially out of line with sentences imposed for other acts. Thus, a death sentence could not be imposed in Georgia unless previously imposed in similar cases throughout the state. Gregg also stands for the proposition that contemporary standards must be applied in reviewing death penalty cases. 428 U.S. at 175.

The Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976) upheld the Florida capital sentencing procedures which provided for a review of a death sentence by the Florida Supreme Court to determine specifically if the sentence was consistent with other sentences imposed in similar circumstances. 428 U.S. at 254. In Proffitt, the United States Supreme Court noted 1) how active the Florida Supreme Court was in the review of death sentences, and 2) that several times Florida had reversed death sentences when its review indicated that the decision to impose death was not in accordance with previous cases upholding the death penalty. 428 U.S. at 260.

The statutory procedure for review of death penalties in the State of Indiana does not provide for a review of all death penalty cases on a state-wide basis as is required by Gregg and Proffitt. The statute does not require the Indiana Supreme Court to determine that the death penalty is consistent with other cases in which the death penalty has been imposed. The statute in Indiana does not require the Supreme Court to determine if the particular crime in fact warrants the death penalty. Indiana Code §§35-50-2-9(h), Appendix A, p. 7, n. 1. Thus, the statutory scheme in the State of Indiana for review of death penalties is in

violation of the cruel and unusual punishment that is prohibited by the Eighth Amendment to the Constitution of the United States as articulated in Gregg and Proffitt.

Secondly, the actual review conducted by the Indiana Supreme Court compared three cases decided in 1855, 1934 and 1938 respectively, in which the death penalty was imposed in felony murders. 417 N.E.2d at 904, Appendix A, p. 16. These cases were decided prior to Indiana's new review procedure and do not reflect contemporarious standards of review or current concern with arbitrary imposition of the death penalty. All of the U.S. Supreme Court Justices have made it clear that the Eighth Amendment is judged by contemporary standards. Thus, cases more than forty years of age certainly would not seem appropriate authority to ascertain contemporary state-wide consistency in the imposition of the death penalty in felony murder situations.

A thorough review of the imposition of the death penalty cases in Indiana reveals that there have been no felony murder death penalties for a non-triggerman in recent years. Petition, supra, pages 7-8. The Indiana Supreme Court's finding was that James Brewer was a proper candidate for execution because he would serve as an example to "deter all who have a penchant to participate in violent crimes." 417 N.E.2d at 905, Appendix A, p. 17. This amounts to a random selection of who is to receive the death penalty, and thus violates Furman, Gregg and Proffitt. 408 U.S. at 309-310; 428 U.S. at 188; 428 U.S. at 254.

Thirdly, the Indiana Supreme Court was presented with the fact that James Brewer's co-defendant, Brooks, was given a 60 year sentence rather than death. The Indiana Supreme Court justified the difference by concluding that there was sufficient evidence to support a finding, beyond a reasonable doubt, that Brewer was the triggerman. 417 N.E.2d at 909, Appendix A, p. 21. Brewer would argue that an appellate court in a death case should not review the record to determine if there is evidence to support

a conviction on a theory or charge different from the one used at the trial level. Brewer was not tried as the intentional killer; the jury was instructed that if Brewer "engage(d) in the commission of an unlawful act" he was responsible for what happened "even though not intended as part of the original design." Tran. p. 47. This is the traditional felony - murder situation; if someone is killed during an armed robbery, all participants in the underlying felony are guilty of murder.

The Indiana Supreme Court stated that it was not privy to the evidence that resulted in Brooks' 60 year sentence and thus there was "no basis for concluding that the sentences were not properly proportioned." 417 N.E.2d at 909, Appendix A, p. 21. Proper appellate review requires the review court to become knowledgeable of Brooks' sentencing and to analyze whether the sentences were proportional. There is no presumption that they are proportional. See Proffitt, 428 U.S. at 251, 259-60; Gardner v. Florida, Marshall dissenting, 430 U.S. 349, at 366-9 (1977). In Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978), the Georgia Supreme Court reviewed the death penalty of an accomplice in an armed robbery. The Court stated that it was necessary to see why the triggerman received a life sentence from the jury. In Hall's case and the triggerman's case, both had prior criminal records and the aggravating circumstance was the armed robbery. With similar backgrounds, the Court found that the death penalty was disproportionate. 244 S.E.2d at 839. The Indiana Supreme Court has failed to meaningfully review the disproportionality of Brewer's death sentence with the triggerman's 60 year sentence.

In conclusion, the Indiana Supreme Court review procedure is unconstitutional because use of a "manifestly unreasonable" criterion does not require a determination of consistency with similar cases in recent years. The Indiana Supreme Court did not compare or analyze any recent cases; to the contrary the cases that were reviewed were all over forty years old.

The actual review conducted by the Indiana Supreme Court under its "manifestly unreasonable" criterion was no more than a traditional appellate criminal review -- a process of finding prior case decisions which supported the imposition of the death penalty for felony murder. The Indiana Supreme Court's open-ended construction of its "manifestly unreasonable" rule is the same kind of construction struck down by the United States Supreme Court in Godfrey v. Georgia, 100 S.Ct. 1759 (1980).

Furthermore, the Indiana Supreme Court erred in specifically singling out Brewer to be executed as an example to those who participate in violent crime. Lastly, the Indiana Supreme Court failed to compare Brewer's death sentence with the trigger-man's sixty year sentence.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE "MOCKERY OF JUSTICE" STANDARD SHOULD BE APPLIED TO REVIEW THE CONDUCT OF COUNSEL AT THE SENTENCING STAGE OF A DEATH PENALTY CASE AND WHETHER BREWER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO COUNSEL AT HIS SENTENCING.

A. "Mockery of Justice" Standard is Improper in a Death Penalty Case.

When the Indiana Supreme Court used the "mockery of justice" standard to review James Brewer's claim of ineffective counsel at his sentencing stage, the United States Supreme Court's holdings in Woodson, Lockett and Gardner were violated; a conflict was created between Indiana and several federal circuit court of appeals decisions regarding effective assistance of counsel as to the standard to use; and a conflict was created with respect to the Sixth Amendment interpretation by other state Supreme Courts in death penalty cases. This situation warrants certiorari, and additionally James Brewer respectfully asks the Court to hold the mockery of justice standard inapplicable in death penalty cases.

On direct appeal to the Indiana Supreme Court James

Brewer argued that he was denied effective assistance of counsel at the sentencing hearing. The Indiana Supreme Court ruled first, that this contention was not substantiated by the record, and second, that even though Brewer alleged several instances of incompetency at the sentencing stage, the court was not "apprised of how the defendant was thereby harmed." 417 N.E.2d at 907, Appendix A, p. 18. The Indiana Supreme Court further found that the presumption of competency of counsel was not overcome, and, applying the standard of "mockery of justice", found that its conscience was not shocked. 417 N.E.2d at 907, Appendix A, p. 18.

First, Brewer argues that in capital cases there is a clear, underlying, constitutional right to counsel at all stages. Capital cases obviously involve a unique and special consideration and the United States Supreme Court many years ago recognized that a capital trial conducted without counsel "would be a little short of judicial murder." See Powell v. Alabama, 287 U.S. 455 (1932). This right to counsel was not extended to all felony trials until over 30 years later. See Gideon v. Wainwright, 372 U.S. 335 (1963). Thus it is clear that on a historical basis the right to effective assistance of counsel in capital cases has been of special concern to the United States Supreme Court.

The succession of death penalty cases beginning in 1972 with Furman v. Georgia, 408 U.S. 238 (1972), has resulted in the development of constitutional principles unique to death cases. These constitutional safeguards as enunciated by the Supreme Court require scrupulous procedural fairness in death penalty cases. Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978). In Gardner v. Florida, 430 U.S. 349 (1977), the Court recognized that competent counsel was absolutely essential at the sentencing stage as well as the guilt determination stage. The Court said:

> (I)t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause. Even though the Defendant has no substantive right to a particular sentence within the range authorized

> by statute, the sentencing is a critical stage of the criminal process, in which he is entitled to effective counsel.
> 430 U.S. at 359.

Certiorari should be granted because the Indiana Supreme Court's use of a "mockery of justice" incorrectly interprets holdings in Woodson, Lockett, and Gardner. See Hankerson v. North Carolina, 432 U.S. 233 (1977).

Secondly, the Indiana Supreme Court's adoption of the "mockery of justice" test directly conflicts with numerous circuits of the federal courts of appeals which have adopted a significantly different standard of review of ineffective counsel. The federal circuits by and large have abandoned the "mockery of justice" test and have adopted a standard approaching a level of normal competence. In Moore v. United States, 432 F.2d 730, 737 (3rd Cir. 1977), the Third Circuit established "the standard of normal competency." In Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977), the Fourth Circuit referred to "representation within the range of competence demanded of attorneys in criminal cases." In McKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), the Fifth Circuit referred to "counsel reasonably likely to render and rendering reasonably effective assistance." In United States ex rel Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975), the Seventh Circuit required "assistance which meets a minimum standard of professional representation." In United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973), the D. C. Circuit required "reasonably competent assistance of an attorney acting as (a) diligent conscientious advocate." It appears that the "mockery of justice" is only followed in two of the eleven federal circuits. United States v. Bubar, 567 F.2d 192 (2nd Cir. 1977), cert. denied, 435 U.S. 872 (1977); United States v. Nelson, 582 F.2d 1246 (10th Cir. 1978), cert. denied, 439 U.S. 1079 (1979).

In addition to the above mentioned circuits that have rejected the mockery of justice test, several commentators have also critized the standard. Gard, Ineffective Assistance of

Counsel Standards and Remedies, 41 Mo.L.Rev. 483 (1976); Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. DeCoster, 93 Harv.L.Rev. 752 (1980); Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Crim.L.Rev. 233, 239 (1979). As Judge Bazelon has stated, "The mockery test requires such a minimal level of performance from counsel that it is itself a mockery of the Sixth Amendment." Bazelon, The Defective Assistance of Counsel, 42 U.Cinn.L.Rev. 1, 28 (1973).

The standard used to review issues involving the Sixth Amendment right to counsel is a constitutional question. The conflict between the standard adopted by the Indiana Supreme Court and the standard elucidated by a number of federal circuit court of appeals is grounds for Certiorari. Katzinger v. Chicago Metallic Mfg. Co., 329 U.S. 394 (1947). In Mr. Justice White's dissent (joined by Mr. Justice Rehnquist) from the denial of certiorari in Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) he said the present Court should:

> (A)ttempt to eliminate the disparities in the minimum quality of representation required to be provided to indigent defendants. In refusing to review a case which so clearly frames an issue that has divided the Court of Appeals, the Court shirks its central responsibility as the court of last resort; particularly its function in the administration of criminal justice. . . .
> 435 U.S. at 1013.

Thirdly, the Indiana Supreme Court's decision also conflicts with other state court decisions that have expanded the standard in death penalty cases. In Solomon v. State, 277 S.E.2d 1 (Ga. 1980), Georgia referred to "counsel reasonably likely to render and rendering reasonably effective assistance." In Ex Parte Duffy, 607 S.W.2d 507 (Tex. 1980) a death penalty was set aside for lack of "reasonably effective assistance of counsel." In State v. Myles, 389 So.2d 12 (La. 1980), Louisiana's Supreme Court required in death cases that the attorney act as "a diligent, conscientious advocate for his (client's) life."

In People v. Jackson, 168 Cal.Rptr. 603, 618 P.2d 149 (1980), a death penalty case, the standard used was a "reasonably competent, diligent and conscientious advocate."

The standard to review the competence of counsel in a death case is an important interpretation of the Sixth Amendment right to counsel. The conflict between various states' interpretation of the Sixth Amendment requires that Certiorari be granted and that the use of the "mockery of justice" standard in death cases be specifically rejected by this Court. See Fuller v. Oregon, 417 U.S. 40, 42 (1974).

B. Facts Showing Ineffective Counsel at Sentencing.

The Indiana Supreme Court closed its eyes to the blatant display of incompetent counsel by relying on the "mockery of justice" test. Even if the mockery test is applied, an honest and fair evaluation of the record will shock the conscience.

1. No Motion for Continuance. The record reflects an unprepared pauper defense attorney at the sentencing stage. If certiorari is granted the record will show that after the jury returned a verdict of murder, court-appointed counsel made an oral Motion for Continuance in the death sentencing hearing but failed to support said motion with any argument or authority; this motion wasn't even made on the record. (Tran. pp. 795, 797.) At the hearing on a Belated Motion to Correct Errors, trial counsel acknowledged that he was not adequately prepared for the sentencing stage. (Tran. p. 796.)

2. No Preparation for Sentencing. At the sentencing stage, it clearly appears that James Frank spent most of his efforts in preparation of a defense to the murder charge itself and admitted no effort preparing for the sentencing stage in the event Brewer was convicted. (See Frank's testimony and Belated Motion to Correct Errors, Tran. pp. 796-802.) It is obvious that factual investigation is of crucial importance to any criminal defense. Trial Manual for Defense of Criminal

Cases, Anthony G. Amsterdam, Reporter, Section 106-107 (1977), and F. Lee Bailey & H. Rothblatt, Investigation and Preparation of Criminal Cases (1970). If trial counsel had properly investigated as is required by ABA Standards for Criminal Justice 4-4.1 (2d Ed. 1980), he would have discovered several important elements that could easily have prevented the imposition of the death penalty. Petition, infra, pp. 18-21.

3. Presentation of perjured alibi evidence. The alibi claimed by James Brewer at the trial stage was fraudulent. The record disclosed that on February 13, 1978, the beginning of Brewer's murder trial, trial counsel filed a Notice of Alibi. The record further disclosed that at the time that this Notice of Alibi was filed, trial counsel had known for a period of five days that James Brewer was in fact present at the Skirpan residence and that the Notice of Alibi was false. (See Tran. pp. 915-6.) Thus, court-appointed counsel saw fit to proceed with the defense of a death penalty murder case with an alibi that counsel knew was manufacturered. Knowing use of perjured testimony violates Indiana disciplinary rules. DR7-102 and EC7-26. Counsel refused to interview the two alibi witnesses prior to putting them on the witness stand. (Tran. p. 585.) The prejudice resulting to Brewer from this improper defense was clearly evident when trial counsel placed the defendant upon the witness stand during the sentencing stage of the prosecution. James Brewer, at the sentencing stage, took the witness stand and admitted that the alibi testimony had been fraudulent. (Tran. p. 611.) A normal jury would be outraged at an obvious attempt to deceive and mislead them by perjured testimony. This element, in and of itself, is sufficient to engender the kind of anger that would enrage a jury, causing them to return a penalty of death. James Brewer should not die because of the lack of ability and competency of his trial counsel.

4. Lack of Investigation into Mental Problems. Adequate pre-trial investigation would have disclosed the fact that as a youth, James Brewer was diagnosed as having mental deficiencies and problems. Trial counsel was unaware of the mental problems suffered by James Brewer prior to the time of the hearing for the death penalty. This failure to investigate the mental background of the client was disastrous to his case at the sentencing stage. Trial counsel admitted to making no preparation for sentencing. (Tran. p. 934.) A minimum of investigation would have disclosed that on February 13, 1968, the Lake County Mental Health Clinic wrote a three page report to the Lake County Juvenile Court discussing James Brewer. At this time James was 12 years old and was described as being "at a very dependent and infantile level, a level of development that comes prior to any real concern or ability to control impulses, in short, self-control." Petition for Rehearing, Appendix A, p. 1. This report was referred to by Dr. Vargas at the hearing on the Belated Motion to Correct Errors. (See Tran. p. 860.) Also referred to by Dr. Vargas were the various reports concerning James Brewer from the Indiana Boys' School. (See Tran. p. 860.) These medical reports and the subsequent evaluation of James Brewer by Dr. Vargas show an individual of extremely limited mentality with evidence of brain damage and a personality that is easily led.

5. Failure to Discover and Present Mitigation Evidence. It must be noted that Indiana's Death Penalty Statute specifically allows the jury to consider mitigating evidence that the murder was committed under the dominance or influence of another. I.C. 35-50-2-9(c)(5); Appendix A, p. 7. If trial counsel had made any investigation into the background of James Brewer he would have become aware of this mental deficiency and problem. The pre-sentence investigation report tendered to the Court, but not the jury, noted that at age 10 the defendant had received

two or three shock treatments and that he had been interviewed approximately five times by a psychiatrist. (Tran. p. 165.) If a pre-sentence investigator could easily discover James Brewer's mental problems, then a diligent defense attorney should have had no problem in discovering the history.

The United States Supreme Court has stressed the constitutional requirement that mitigating factors be presented:

> A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.
>
> Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances. In Gregg v. Georgia, we today hold constitutionally valid a capital sentencing system that directs the jury to consider any mitigating factors, and in Proffitt v. Florida we likewise hold constitutional a system that directs the judge and advisory jury to consider certain enumerated mitigating circumstances.
> Jurek v. Texas, 428 U.S. 262, 271-272 (1976), cert. denied, 130 U.S. 951 (1977).

Thus, without the knowledge of the mitigating factors concerning James Brewer's mental deficiencies and mental problems, defense counsel placed James Brewer on the stand to simply testify that he was under the influence of drugs at the time of the robbery and that Kenny Brooks did the shooting. (See Tran. pp. 610-13.)

6. Cross-examination of Brewer at Sentencing. What occurred during the cross-examination of James Brewer at sentencing should shock the conscience of any trial attorney involved in a death case. Trial counsel, rightly or wrongly, was under the impression that James Brewer would be treated in a special manner on cross-examination. As trial counsel stated in his Motion to Correct Errors (Tran. pp. 1-8), he understood that the trial court had assured him that James Brewer would not be cross-examined as to his past criminal record or about the circumstances of the crime on the night in question. The State of Indiana was

permitted detailed and extensive cross-examination of Brewer into his past record and the other robberies the same night, with no objections being made by trial counsel. Trial counsel himself indicated that he felt that he was incompetent in relying upon off of the record statements, from a Judge whom he considered as his friend (Tran. pp. 787-9), that such extensive cross-examination of James Brewer would not be permitted. For an attorney to place a defendant upon the stand without first making a clear record as to the nature and extent of the examination can be considered nothing other than ineffective counsel.

7. Failure to Present Character Evidence - Mitigating Circumstances. Trial counsel also failed to present any character evidence at the sentencing stage of this proceeding, even though such character evidence did in fact exist and was presented at the hearing on the Belated Motion to Correct Errors. (See Tran. pp. 886-880; Tran. p. 893.) At the hearing on the Belated Motion to Correct Errors evidence was presented by Dennis Ford that he had known James Brewer for a great number of years and that in his opinion he was easily led by other people. (See Tran. p. 874-5.) This type of evidence would be absolutely crucial in establishing mitigating circumstances to avoid the imposition of the death penalty. By failing to introduce evidence of mitigating circumstances, the jury was left with the impression that no mitigating circumstances existed. A jury cannot weigh mitigators against aggravators, as required by Indiana's Death Penalty Statute, if trial counsel, because of failure to prepare, offers no evidence on behalf of his client. Under the wording of Indiana's statute, the jury had no choice but to return a recommendation of death. Trial counsel's ineffectiveness in this regard prejudiced his client by forcing the jury to recommend the death penalty.

8. No Objection to Good Time Instruction. Another instance of ineffective assistance of counsel occurred following the jury's tendered question to the trial court concerning whether a sentence of life imprisonment would be imposed if the jury did not give the defendant a death sentence. With no objections from counsel, the jury was informed that Brewer could receive a sentence from 30 to 60 years and with good time credit he could be released in 15 years. There was Indiana authority against such an instruction. See Feggins v. State, 265 Ind. 674, 359 N.E.2d 517 (1977). To allow the jury to think that Brewer could be released in fifteen years on the murder sentence was prejudicial because the jury's deliberation then turned on what they could regard as an absolute maximum sentence of 15 years weighed against a sentence of death. If the jury thought 15 years was not sufficient punishment, they could have felt compelled to return a recommendation of death.

9. Instructions to Jury Without Defendant Being Present. A ninth example of incompetency of counsel occurred when trial counsel allowed the violation of his client's right to be present by permitting the Judge to instruct the jury on good time credit without Brewer's presence. Trial counsel stated in front of the jury:

> May it please the court, for purposes of answering the question of the jury, I would waive the presence of the defendant. He was taken back to jail. It involves too much time for this limited purpose.
> (Tran. p. 651.)

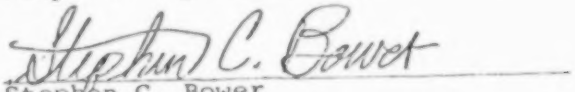
Court-appointed counsel apparently was not aware of his responsibility to have the defendant present at all crucial stages. Drope v. Missouri, 420 U.S. 162 (1975).

In conclusion, the mockery of justice standard should be rejected as too low a standard in death cases. The nine examples of ineffective counsel should warrant certiorari to reverse the death penalty.

CONCLUSION

For these reasons certiorari should be granted to review the decision of the Indiana Supreme Court.

Respectfully submitted,



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Appendix

James BREWER, Defendant-Appellant,

v.

STATE of Indiana, Plaintiff-Appellee.

No. 678 S 119.

Supreme Court of Indiana.

March 6, 1981.

Defendant was convicted in the Superior Court, Lake County, James L. Clement, J., of murder and was sentenced to death. Defendant appealed. The Supreme Court, Prentice, J., held that: (1) the evidence was sufficient to sustain the conviction; (2) the trial court did not err in admitting evidence of other criminal activity by the defendant; (3) the death penalty statute was not unconstitutional; (4) imposition of the death penalty was appropriate; (5) the charging requirements of the death penalty statute were complied with; (6) the trial court did not err in denying defendant's motion for a continuance of the sentencing hearing; (7) defendant's rights against compulsory self-incrimination were not violated at the sentencing hearing; (8) defendant was not denied the effective assistance of counsel at the sentencing hearing; (9) defendant was not denied access to the report of a psychologist who had examined defendant for sentencing purposes; (10) trial court did not err in advising the jury, during deliberations following the sentencing hearing, concerning parole possibilities concomitant to a prison term; and (11) a sentence of 60 years' imprisonment awarded to defendant's accomplice did not render defendant's death sentence cruel and unusual.

Affirmed.

DeBruler, J., dissented with opinion.

1. Criminal Law ⇐552(1)

Circumstantial evidence alone may support conviction, so long as reasonable man could find each element of crime therefrom, beyond reasonable doubt.

2. Homicide ⇐236(1)

Medical testimony is not prerequisite to establishing cause of death in murder case.

3. Homicide ⇐234(1), 236(1)

In murder prosecution, evidence was sufficient to establish cause of victim's death, to place defendant at scene of crime, to identify defendant as person who shot victim, and to sustain conviction. IC 35-42-1-1 (1980 Supp.).

4. Criminal Law ⇐369.2(1)

Although not admissible to show defendant's propensity to commit crimes in general, evidence of prior crimes is admissible, if it is relevant to some issue in case, most commonly intent, motive, knowledge, plan, identity or credibility.

5. Criminal Law ⇐369.15

In prosecution for homicide committed by defendant and a companion in course of armed robbery, evidence of four other robberies committed by defendant and companion on the same day as the killing was admissible, because it had logical tendency to identify defendant as one of the cofelons and because there were a number of similarities in the modus operandi by which all the robberies were effected, thus evidencing that they were committed by the same persons.

6. Criminal Law ⇐1206(1)

Imposition of death penalty is not unconstitutional per se. IC 35-50-2-9 (1980 Supp.).

7. Criminal Law ⇐1213

Indiana death penalty statute did not violate State or Federal Constitutions' bans on cruel and unusual punishment. U.S.C.A. Const. Amend. 8; Const. Art. 1, § 16; IC 35-50-2-9 (1980 Supp.).

8. Criminal Law ⇐1205

Constitutional provision that Penal Code shall be founded on principles of reformation and not vindictive justice did not bar imposition of death penalty. Const. Art. 1, § 18; IC 35-50-2-9 (1980 Supp.).

9. Criminal Law ⇐1206(1)

Death penalty statute, which provided for mandatory review by Supreme Court of

articulated reasons for opposing death penalty, together with review of evidence supporting those reasons, was not unconstitutional. U.S.C.A.Const. Amend. 8; Const. Art. 1, § 16; IC 35-50-2-9 (1980 Supp.).

10. Criminal Law ⇐1213
Homicide ⇐354

Imposition of death penalty for murder committed in course of armed robbery was not based upon capricious or arbitrary consideration, was not manifestly unreasonable, and did not constitute cruel and unusual punishment. U.S.C.A.Const. Amend. 8; Const. Art. 1, § 16; IC 35-50-2-9 (1980 Supp.).

11. Criminal Law ⇐1213

Constitutional proscriptions against cruel and unusual punishment did not preclude inflicting death penalty upon one whose role in crime was that of accessory, as opposed to principal. U.S.C.A.Const. Amend. 8; Const. Art. 1, § 16; IC 35-50-2-9 (1980 Supp.).

12. Homicide ⇐354

Evidence was sufficient beyond reasonable doubt to establish that defendant, not his accomplice, intentionally killed victim in course of armed robbery and thus, even if imposition of death penalty upon accessory were unlawful, imposition of death penalty upon defendant would be lawful. U.S.C.A. Const. Amend. 8; Const. Art. 1, § 16; IC 35-50-2-9 (1980 Supp.).

13. Indictment and Information ⇐71.4(5)

In prosecution for murder in which death penalty was sought, prosecution's failure to allege on page separate from the rest of the charging instrument the existence of aggravating circumstances did not amount to failure to apprise defendant that death penalty would be sought where defendant was charged with murder and with intentional murder in perpetration of robbery, and robbery was first listed aggravated circumstance rendering death penalty applicble; thus no benefit could flow to defendant from segregation of charge of aggravating circumstances from charge of murder. IC 35-50-2-9(a) (1980 Supp.).

14. Criminal Law ⇐986.1

In prosecution for murder in which death penalty was sought, trial court did not abuse its discretion in denying defendant continuance of sentencing hearing where defendant presented no factual basis to trial court which warranted delay in proceedings.

15. Criminal Law ⇐586, 1151

Determination of whether to grant continuance lies within sound discretion of trial court when motion therefor is not based upon statutory grounds; denial of such motion will be overturned only when abuse of discretion is demonstrated.

16. Criminal Law ⇐589(1)

Denial of motion for continuance grounded upon sheer speculation that some benefit might flow from it cannot be said to be arbitrary or abusive.

17. Witnesses ⇐300

In prosecution for murder in which death penalty was sought, defendant's privilege against self-incrimination was not denied in consequence of defense counsel's putting him upon witness stand in sentencing hearing in reliance upon trial judge's informal recommendation and assurance that he would not permit extensive cross-examination, since defendant's taking stand was only way to submit mitigating evidence and defense counsel thus had no alternative but to put defendant upon stand.

18. Criminal Law ⇐641.13(7)

In prosecution for murder in which defendant received death penalty, record refuted defendant's contention that he was denied effective assistance of counsel at sentencing hearing.

19. Criminal Law ⇐323

Presumption is that counsel was competent and that presumption can be overcome only by clear showing that his actions or inactions resulted in mockery of justice such that collective conscience of Supreme Court is shocked.

20. Criminal Law ⇐986.1

•In prosecution in which death penalty was sought, evidence presented at trial could be made part of record of sentencing hearing. IC 35-50-2-9(d) (1980 Supp.).

21. Criminal Law ⇐1177

In prosecution for murder in which death penalty was sought, failure to formally serve defendant with copy of psychologist's report of examination of defendant for sentencing purposes was not prejudicially erroneous where defendant and defense counsel were aware that examination had been made, defendant was never denied access to report and defendant made no protest when court made reference to report in sentencing.

22. Criminal Law ⇐1028

In murder prosecution in which death penalty was sought, assignment of error not presented at trial was not available for appellate review; however, in view of gravity of death sentence pronounced on defendant and need for guidance concerning newly established procedure, question concerning death penalty statute would be reviewed.

23. Homicide ⇐354

In prosecution for homicide in which death penalty was sought, jury was entitled to knowledge as to when defendant would be eligible for parole if life sentence were imposed.

24. Criminal Law ⇐983

Imposition of death penalty on defendant convicted of murder committed during course of armed robbery was not rendered cruel and unusual when compared to sentence of 60 years' imprisonment imposed upon defendant's accomplice. I.C. § 35-50-2-9 (1980 Supp.).

Dennis R. Kramer, Crown Point, for defendant-appellant.

Linley E. Pearson, Atty. Gen. of Indiana, Thomas D. Quigley, Palmer K. Ward, Deputy Attys. Gen., Indianapolis, for plaintiff-appellee.

PRENTICE, Justice.

Defendant (Appellant) was convicted in a trial by jury of Murder, in that he knowingly or intentionally killed Stephen Skirpan. Ind. Code § 35-42-1-1 (Burns 1979). Following a sentencing hearing thereafter held before the same jury, it was determined that said murder was committed by Defendant while committing or attempting to commit a robbery, and a sentence of death was recommended and thereafter decreed by the court. Ind.Code § 35-50-2-9 (Burns 1979).

This direct appeal challenges both the legality of the defendant's conviction and the legality of the sentence and presents the following issues:

(1) Whether the verdict was sustained by sufficient evidence.

(2) Whether the trial court erred in admitting evidence of other criminal activity by the defendant.

(3) Whether our death sentence statute violates constitutional proscriptions in any of the following respects:

(A) As a transgression of Article 1, Section 18 of the Constitution of Indiana providing that the penal code shall be founded on the principles of reformation and not vindictive justice.

(B) In failing to provide the parameters of the review of the sentence required by this Court.

(C) As permitting the imposition of the death penalty against one convicted under a theory of vicarious liability, hence allowing punishment that is cruel and unusual, and not proportioned to the crime.

(4) Whether the finding of an aggravating circumstance, prerequisite to the imposition of the death sentence, was sustained by sufficient evidence.

(5) Whether the charging requirements of the death penalty statute were complied with.

(6) Whether the court erred in denying Defendant's motion for a continuance of the sentencing hearing.

(7) Whether the defendant's rights against compulsory self-incrimination were violated at the sentencing hearing.

(8) Whether the defendant was denied the effective assistance of counsel at the sentencing hearing.

(9) Whether the defendant had been denied access to the report of a psychologist who had examined the defendant, pursuant to a *sua sponte* order of the court made following the return of the jury's death penalty recommendation.

(10) Whether the trial court erred in advising the jury, during deliberations following the sentencing hearing, concerning parole possibilities concomitant to a prison term.

(11) Whether Defendant's death sentence is an unconstitutional application of the death penalty statute, as excessive and irrational, hence cruel and unusual, when compared with the sentence of sixty (60) years imprisonment awarded to the accomplice, Brooks.

* * * * * *

ISSUE I

In the late afternoon of December 4, 1977, the decedent Stephen Skirpan, a young man, was at home with his parents, Mr. and Mrs. John Skirpan, and his cousin, Joyce Matthews. At approximately 5:00 p. m., the front door bell rang, and he responded. Mr. Skirpan was then summoned by the decedent, who said that two detectives wanted to speak with him. The callers were two well-dressed, youthful looking black men, the defendant and Kenneth Brooks. They stood in the doorway and displayed a badge and announced that they were investigating a traffic accident in which one of the Skirpan automobiles had been involved. Mr. Skirpan advised the callers that their automobiles were parked in front of the house, had been there all day and that they could look at them. One of the callers responded that they had a search warrant, and Mr. Skirpan asked to see it. With that, the defendant, who was standing behind Brooks began to move and exclaimed, "This is a hold up!" Brooks pushed Mr. Skirpan aside and drew a handgun. Simultaneously, a shot was fired, and Stephen fell to the floor. Brooks then held Mr. Spirpan at bay with his gun, while the defendant, who was also armed with a drawn handgun, stepped into the house. Both Brooks and the defendant entered the house.

The defendant and Brooks held Mr. and Mrs. Skirpan and Joyce at gunpoint and demanded money. Mrs. Skirpan said that the money was in the bedroom, and the defendant went to look for it. Meanwhile, Brooks took money from Mr. Skirpan and searched Mrs. Skirpan's person, herded her, Mr. Skirpan and Joyce into the bathroom, closed the door and ordered them to remain there for ten minutes.

After approximately one minute inside the bathroom, the Skirpans and Joyce emerged and found that their assailants had departed. The entire episode had lasted seven to ten minutes. Mrs. Skirpan rushed to a neighbor's house for help, and as she did, she saw a dark blue sedan depart from the area. Joyce summoned an ambulance, but when it arrived, Stephen was dead.

The defendant's claim of insufficiency of the evidence is addressed to the absence of medical evidence of the cause of Stephen's death, the alleged absence of evidence placing him at the scene of the crime and the absence of evidence identifying him as the one who shot Stephen.

[1] Circumstantial evidence alone may support a conviction, so long as a reasonable man could find each element of the crime therefrom, beyond a reasonable doubt. *Jackson v. State*, (1980) Ind., 402 N.E.2d 947; *Ruetz v. State*, (1978) 268 Ind. 42, 373 N.E.2d 152, *cert. denied*, 439 U.S. 897, 99 S.Ct. 261, 58 L.Ed.2d 245.

[2, 3] With respect to the evidence of the cause of decedent's death, we have heretofore held that medical testimony is not a prerequisite to establishing the cause of death in a murder case. *Hall v. State*, (1978) 269 Ind. 24, 378 N.E.2d 823; *Hudson v. State*, (1976) 265 Ind. 302, 354 N.E.2d 164.

Stephen fell to the floor simultaneously with the firing of a handgun at close range. He was not moved and was found to be dead when examined shortly thereafter. An autopsy was performed and a bullet, which had entered the front left side of Stephen's abdomen and travelled downward, was removed from a point just above his right hip. From such evidence, a reasonable person could conclude, beyond a reasonable doubt, that Stephen died of a bullet wound.

With regard to Defendant's contention that there was insufficient evidence placing him at the scene of the crime, the evidence revealed the following:

The decedent was shot and killed in his home by one of two men during the commission of a robbery at approximately 5:00 p. m. One of the assailants was identified as Kenneth Brooks by two eyewitnesses who were also victims. Admittedly, the witnesses could not identify the defendant as the other assailant, their testimony concerning the height and the sound of the voice of the unidentified assailant did not match such characteristics of the defendant, and defense witnesses testified that the defendant was elsewhere at the time the crime was committed. Nevertheless, there was also testimony that another armed robbery had occurred at approximately 4:30 p. m. the same day, and, at approximately 7:30 p. m. of the same day, a series of three robberies by force had occurred at an apartment house. The defendant and Kenneth Brooks were identified by eyewitnesses as the ones who perpetrated all four robberies, all of which occurred in Gary, which was the scene of the Skirpan residence. Additionally, also in Gary, at approximately 6:30 p. m. that day, the defendant and Kenneth Brooks were seen together in a bail-bond office.

Part of the money stolen in the robbery of the Skirpans was in bicentennial commemorative coins, which they had been saving. When arrested, later that evening, two silver dollars, two half dollars and two quarters, all of the commemorative issue, were found on Defendant's person. Further, when the police attempted to arrest the defendant and Brooks, they were travelling together, and the defendant shot at them.

Notwithstanding some discrepancies in the identification testimony, which were matters for the jury to consider, the foregoing related circumstantial evidence was ample to permit a reasonable person to conclude, beyond a reasonable doubt, that the defendant was the assailant with Kenneth Brooks at the time of the robbery and murder.

The defendant's final submission with regard to the sufficiency of the evidence is that there was no evidence that he actually shot Stephen Skirpan. While conflicting inferences as to whether it was Brooks or the defendant who shot Stephen can be drawn from the evidence and although there may have been some conflicts between Mr. Skirpan's description of the assailant and the defendant's actual stature, we find the conflict to be immaterial. Under Ind.Code § 35-41-2-4 (Burns 1979), an offense is committed whenever one intentionally or knowingly aids, induces or causes that offense to be committed. We have held in similar circumstances that concerted action or participation in a crime is sufficient for this purpose. *See, e. g., Webb v. State*, (1977) 266 Ind. 554, 364 N.E.2d 1016; *Simmons v. State*, (1974) 262 Ind. 300, 315 N.E.2d 368. The evidence in this case fully supports a determination that the defendant participated in the commission of the crime at bar. (This issue treated further under Issue IV).

ISSUE II

[4] Over the defendant's objections, the trial court permitted the introduction of evidence disclosing his participation in the aforementioned other four robberies. Although not admissible to show a defendant's propensity to commit crimes in general, evidence of prior crimes is admissible, if it is relevant to some issue in the case, most commonly intent, motive, knowledge, plan, identity or credibility. *Lawrence v. State*, (1972) 259 Ind. 306, 286 N.E.2d 830, and

cases there cited. *Also see* Underhill's Criminal Evidence, § 205 at 595 (6th ed. 1973).

[5] In the instant case, the evidence objected to was relevant, in that it had a logical tendency to identify the defendant as the accomplice with Brooks at the time of the Skirpan robbery and murder. He was in the company of Brooks, both before and after the incident and in close proximity thereto, both in time and distance. Additionally, there were a number of similarities in the *modus operandi* by which all the robberies, including the one of the Skirpans, were effected, thus evidencing that they were committed by the same persons.

ISSUE III

[6] The defendant contends that our death penalty statute, Ind.Code § 35-50-2-9 (Burns 1979), under which he has been sentenced to death, is unconstitutional, *per se*, as being in derogation of the proscription against the infliction of "cruel and unusual punishment" of the Eighth Amendment to the Constitution of the United States. Although no claim has been made under the companion provision of Article I, Sec. 16 of our state constitution, it is appropriate that we regard this assignment as a challenge under both the Federal and the State Constitutions.

This Court has consistently held that the death penalty does not offend Article I, Sec. 16. *Adams v. State*, (1971) 259 Ind. 64, 74, 271 N.E.2d 425, 430, (DeBruler, J. and Prentice, J. dissenting) and cases there cited.

With regard to Defendant's claim under the Eighth Amendment, we are governed by the decisions and opinions of the Supreme Court of the United States. Although the Court, in *Furman v. Georgia*, (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, found it unnecessary to determine the constitutionality of death sentences *per se*, the separate opinions of the Justices dealt at length with the issue and arrived at diametrically opposed conclusions. The majority, however, found no *per se* proscription, leaving the unmistakable inference that it was possible, under the amendment, for the states to enact and administer statutes authorizing the imposition of the death penalty.

In response to the Court's holding and opinions in *Furman*, a number of the states, including Indiana, whose death penalty statutes had not passed constitutional muster because they granted to juries the untrammeled discretion to impose or withhold the death penalty in those cases where it was authorized by statute, enacted statutes to replace the deficient ones. Four years later, the Court affirmed three death sentences imposed under such statutes, thus leaving nothing to inference upon the issue. *Gregg v. Georgia*, (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida*, (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas*, (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929.

ISSUE III(A)

[7] Having determined that the death penalty is not unconstitutional *per se*, as being in derogation of either the Eighth Amendment to the Constitution of the United States or Article I, Sec. 16 of the Constitution of Indiana, we now turn to a consideration of the Indiana Statute, Ind. Code § 35-50-2-9 (Burns 1979),[1] in light of

1. Ind Code § 35-50-2-9 (Burns 1979) provides:

(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one [1] of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one [1] of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

Pronouncements of the Supreme Court of the United States emanating subsequent to *Furman v. Georgia, supra.*

We have very recently considered these matters in *Judy v. State,* handed down January 30, 1981 (Ind.) 416 N.E.2d 95. It was unfortunate that that case was the first to arrive in this Court under the relevant statute, because the condemned man insisted upon waiving his appellate rights, thus depriving us of the benefits that flow from adversary proceedings. It should be noted, however, that although we recognized Judy's right to waive his right to appeal his conviction, we also recognized that we were under legislative mandate to review his sentence, regardless of his wishes in the matter.

"Although we feel Steven Judy can waive and has waived review of any issue that might be raised with reference to his convictions, we believe that the death sentence cannot be imposed on anyone in this State until it has been reviewed by this Court and found to comport with the laws of this State and the principles of our State and Federal Constitutions." *Judy, supra.*

To permit Judy to be put to death upon a finding that his sentence was permissible under our statute, but without regard to

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one [1] of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one [1] of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the Supreme Court. The review, which shall be heard under rules adopted by the Supreme Court, shall be given priority over all other cases. The death sentence may not be executed until the Supreme Court has completed its review.

the validity of the statute, would have been an aberration beyond comprehension. Accordingly we proceeded to a study not only of the propriety of his sentence under our statute but also of the constitutionality of the statute, in all of its aspects. From that study, diligently pursued, we concluded that our statute and our procedures thereunder and under related statutes and court rules are consistent with and are in full compliance with the pronouncements of the Supreme Court of the United States in *Gregg v. Georgia, supra, Proffitt v. Florida, supra,* and *Jurek v. Texas, supra.*

We have now been subjected to a vigorous challenge and debate in keeping with the tradition of English and American Jurisprudence. We have reconsidered our conclusions in the light of Defendant's arguments and authorities, but no cogent argument or authority has been here presented that was not fully considered, albeit sua sponte, in the *Judy* review, and we are convinced that our decision in that case was correct.

As stated in *Judy, supra,* "We note that our present statute is very similar to the statutes under consideration in those cases, • • • (*Gregg, Jurek* and *Proffitt*) • • • and, in fact, is nearly identical to the Florida statute[2] upheld in *Proffitt.*" Our task

2. The statute upheld in *Proffitt* was Fla Stat. Ann. § 921.141 (Supp. 1976-1977), which provided:

(1) Separate proceedings on issue of penalty. —Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances as enumerated in subsection (6) exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentences of death. —Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances as enumerated in subsection (6) to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

ip determining whether our statute meets the current standards is, therefore, minimal.

A comparative analysis of the Florida statute and our own reveals that under both, the determination is made by the judge and require the following, as prerequisites to the imposition and execution of a sentence of death:

(1) A conviction of murder.

(2) A hearing for purposes of determining the sentence to be imposed, separate from the trial at which the issue of guilt was determined.

(3) In jury trials, a finding, by the jury, of at least one (1) of the aggravating circumstances enumerated in the statute.

(4) In jury trials, a finding, by the jury, that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(5) In jury trials, a recommendation by the jury, as to whether or not the death penalty should be imposed.

(6) A finding by the trial court of at least one (1) of the aggravating circumstances enumerated in the statute.

(7) A finding by the trial court that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(8) The completion, prior to carrying out the sentence, of an automatic expedited review of the imposed sentence by the Supreme Court of the State.

In holding that the death penalty is not *per se* unconstitutional, the Court said in *Gregg v. Georgia, supra*:

"We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." 428 U.S. at 187, 96 S.Ct. at 2932, 49 L.Ed.2d at 883.

Which is but another way of saying that the penalty may be extracted, if the circumstances of the offense and the character of the offender both warrant and if the procedures followed in making the determination are such as reasonably to assure that it was not done arbitrarily or capriciously.

In all three cases, *Gregg*, *Proffitt* and *Jurek*, the Court examined the pertinent statutes with a view to determining if they met such criteria; and in each case it found that they did, although by varying means. In the Florida case, the Court specifically noted the presence of the eight attributes hereinbefore set forth as being common to both Florida and Indiana, and concluded:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

"On their face these procedures, like those used in Georgia, appear to meet the constitutional deficiencies identified in Furman. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed. This determination requires the trial judge to focus on the circumstances of the crime and the character of the individual defendant. He must, inter alia, consider whether the defendant has a prior criminal record, whether the defendant acted under duress or under the influence of extreme mental or emotional disturbance, whether the defendant's role in the crime was that of a minor accomplice, and whether the defendant's youth argues in favor of a more lenient sentence than might otherwise be imposed. The trial judge must also determine whether the crime was committed in the course of one of several enumerated felonies, whether it was committed for pecuniary gain, whether it was committed to assist in an escape from custody or to prevent a lawful arrest, and whether the crime was especially heinous, atrocious, or cruel. To answer these questions, which are not unlike [428 U.S. 252, 96 S.Ct. 2966] those considered by a Georgia sentencing jury, see *Gregg v. Georgia* at 197, 459 L.Ed.2d 859, 96 S.Ct. 2909, the sentencing judge must focus on the individual circumstances of each homicide and each defendant." [428 U.S. 252, 96 S.Ct. 2966], 49 L.Ed.2d 922.

"The Florida capital-sentencing procedures thus seek to [428 U.S. 253, 96 S.Ct. 2967] assure that the death penalty will not be imposed in an arbitrary or capricious manner." [428 U.S. 253, 96 S.Ct. 2967], 49 L.Ed.2d 923.

Looking now to the variances in the Florida and Indiana statutes, we find that in most respects, Indiana is more restrictive in the applicability of death sentences than is Florida. Indiana requires that when the guilt issue was tried by jury, the sentencing hearing must be before the same jury, whereas Florida permits the impaneling of a special jury for the sentencing, under certain circumstances. The finding of enumerated aggravating circumstances must be beyond a reasonable doubt in Indiana, while, in Florida, no standard of proof is specified.

Florida permits the recommendation of a death sentence by a mere majority of the jury; while our statute requires unanimity in the recommendation, if any. Notwithstanding that the court may proceed without a recommendation, if the jury is unable to agree and, notwithstanding that it is not bound by the recommendation, if forthcoming, we are of the opinion that the requirement of the Indiana statute cannot but have a mollifying effect.

The Indiana statute affirmatively provides that there be no limitation upon the mitigating circumstances to be taken into account in determining the sentence, whereas the Florida Act, however, has been interpreted as being without limitation with respect to mitigating circumstances. See *Lockett v. Ohio* (1978) 438 U.S. 586, 606, 98 S.Ct. 2954, 2965–66, 57 L.Ed.2d 973, 991 (citing *Proffitt*, 428 U.S. at 250 n. 8, 96 S.Ct. at 2965–66 n. 8, 49 L.Ed.2d at 922 n. 8).

The Florida statute permits the relaxation of the rules of evidence at the sentencing hearing, but, inasmuch as this could facilitate the presentation of evidence by the State as well as by the defendant, we do not regard the adherence to customary evidentiary rules as having any impact adverse to fundamental fairness.

Neither do we perceive as significant the variance with respect to the time limitation for review placed upon the Supreme Court of Florida but not upon the Supreme Court of Indiana. In both *Gregg, supra*, and *Proffitt, supra*, the Court expressed a very favorable regard for the requirement of a review by the supreme court of the concerned state. However, in neither did it comment upon time limitations or even upon the requirement that such reviews be expedited. The giving of priority to such matters is altogether appropriate. However, no matter can be permitted to domi-

nate the court to the exclusion of all others. The degree of priority given under such a statutory mandate must, therefore, rest in the sound discretion of the court. Any other view would be a denial of our judicial authority and responsibility.

We found in *Judy* that our legislative and procedural scheme comports with the standards and guidelines provided for in *Gregg*, and *Proffitt* at the trial and appellate levels. In *Gregg*, the United States Supreme Court wrote approvingly of the requirement for the sentencing authority to specify the factors relied upon in reaching its decision referring to it as "... a further safeguard of meaningful appellate review ... to insure that death sentences are not imposed capriciously or in a freakish manner." 428 U.S. 195, 96 S.Ct. at 2935, 49 L.Ed.2d at 886-87. This is also required under the Florida statute. As we pointed out in *Judy*, even though this provision is not specifically in our death penalty statute, it is required and followed in the sentencing of all of those convicted of committing felonies in the State of Indiana.

Article 7, § 4 of our Indiana Constitution provides: "The Supreme Court shall have in all appeals of criminal cases the power to review all questions of law and to review and revise the sentence imposed." And under our Indiana Constitution and rules adopted by this Court, exclusive jurisdiction of criminal appeals from judgments or sentences imposing death, life imprisonment or a minimum sentence of greater than ten years, is reposed in this Court. Ind.R. App.P. 4(A)(7).

Our rules for the appellate review of sentences, effective January 1, 1978, are as follows:

"1. *Availability*—Court.

(1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.

(2) Appellate review of sentences under this rule may not be initiated by the State.

(3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.

"2. *Scope of Review.*

(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Indiana's general sentencing hearing statutes require in all cases where there are aggravating circumstances present that the sentencing judge include a statement of the reasons for selecting the sentence he imposes. This enactment, Ind.Code § 35-4.1-4-3 (Burns § 35-50-1A-3, (1979 Repl.)) provides as follows:

"Sentencing hearing in felony cases.—Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:

(1) A transcript of the hearing;

(2) A copy of the presentence report; and

(3) If the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes."

We found in *Judy* that the requirement that the sentencing authority state his reasons in writing in the record facilitated meaningful appellate review by this Court of the trial court's sentencing decision. *Judy, supra; Proffitt v. Florida, supra; Page v. State*, (1980) Ind., 410 N.E.2d 1304; *Brandon v. State*, (1976) 264 Ind. 177, 340 N.E.2d 756; *Love v. State*, (1971) 257 Ind. 57, 272 N.E.2d 456. This statute was de-

signed to restrict trial courts to the rational exercise of their discretion to impose, enhanced or diminished sentences and to facilitate our review of such sentences. Death is an enhanced penalty for murder committed under certain designated circumstances. Ind Code § 35-50-1A-3 (Burns 1979 Repl.) and all of the other statutory constitutional and judicial requirements set out above are applicable when a death sentence is to be imposed and were complied with in the case before us.

As has been pointed out to us by the defendant, our statutory and procedural scheme is not exactly like those in any of those states whose death penalty procedures have been approved by the United States Supreme Court. However, as that Court stated in *Gregg, supra*: "We do not intend to suggest that only the above described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis." 428 U.S. 195, 96 S.Ct. 2935, 49 L.Ed 2d 887. Thus, although there are some variances in the procedures prescribed under our statute and the Florida statute, those variances do not appear to be critical. The procedures required in *Gregg, supra*, were also different from those required in *Proffitt, supra*, and those required in *Jurek, supra*, were at a substantial variance from those applicable in either of the other two. We hold that our statutory and procedural scheme limits the imposition of death sentences in such manner as to assure that they will not be inflicted in an arbitrary or capricious manner, and upon that basis the provisions thereof for sentences of death violate neither the Eighth Amendment to the Constitution of the United States nor its counterpart in our State Constitution, Article I, Sec. 16.

[8] Defendant has cited us to Article I, Sec. 18 of the Constitution of Indiana in support of his position that the death penalty is cruel and unusual punishment violative of the Eighth and Fourteenth Amendments to the Constitution of the United States. His claim is not supported by cogent argument, and we fail to perceive any interplay between these constitutional provisions. It should be here noted, however, that we have previously held that Article I, Sec. 18 did not proscribe death penalties. *Adams v. State*, (1971) 259 Ind. 64, 271 N.E.2d 425, (DeBruler, J. and Prentice, J. dissenting); *Judy, supra*.

ISSUE III(B)

[9] Defendant also contends that our statute, Ind Code § 35-50-2-9 (Burns 1979) is constitutionally infirm because: "[I]t does not provide a complete review of the trial court's decision by the Supreme Court." His argument is premised upon the omission from this Statute of specifications to determine the parameters of our review. We have previously noted the similarity of our statute and our procedures to those of Florida approved in *Proffitt v. Florida, supra*. We have also observed that Ind Code § 35-50-1A-3 (Burns 1979) requires the sentencing judge to make written findings. In *Judy, supra*, and in this opinion, we have pointed out that our Constitution, our statutes, and our court rules provide for a review of all penalties fixed by trial courts, including the death penalty. A review of a death sentence under our rule and pursuant to our Constitution and our aforementioned statutes will meet the guidelines established by the Supreme Court of the United States as expressed in *Gregg v. Georgia, supra; Proffitt v. Florida, supra*; and *Woodson v. North Carolina*, (1976) 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed 2d 944. These cases made it clear that the function of appellate review in the overall consideration of constitutionality is to assure that the system, as applied in a particular case, precludes the capricious and arbitrary infliction of the penalty, by assuring that the legislative guidelines have not been circumvented by the sentencing authority. Our standard of review precluding the revision of sentences authorized by statute except for manifest unreasonableness is, in essence, no different from the recent dictates of the United States Supreme Court that capriciousness and arbitrariness in the infliction of death penalties cannot be other than cruel and unusual.

Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, together with a review of the evidence supporting these reasons assures consistency, fairness and rationality in the operation of the death penalty statute. *Proffitt v. Florida, supra. See Gregg v. Georgia, supra. Cf. Woodson v. North Carolina, supra; French v. State,* (1977) 266 Ind. 276, 362 N.E.2d 834. The application of the guidelines and procedures established by our Constitution, statutes and rules effect an informed, focused, guided and objective inquiry, by all concerned into the appropriateness, under the statute, of capital punishment in a given case. Therefore, as in *Judy, supra*, we hold our death sentencing procedures to be consistent with and in full compliance with those required by the Supreme Court of the United States in *Gregg v. Georgia, supra* and *Proffitt v. Florida, supra*, and thus not violative of the Eighth and Fourteenth Amendments to the United States Constitution.

[10] In reviewing the imposition of the death penalty in this case, it is apparent that all of the statutory procedures were followed in the trial of this defendant. As already set out in this opinion, the jury and the trial judge found the homicide by the defendant here to have been committed in the perpetration of a felony. A separate sentencing hearing was held following the guilt determination, and all mitigating circumstances were considered and weighed against the aggravating circumstance. The trial judge followed the same procedure and in addition, had in his possession and knowledge all the information in the pre-sentence report filed by the probation officer as well as all evidence presented to him by both the parties in aggravation and mitigation at the sentencing hearing. The trial judge made his findings [3] in writing in the record stat-

3. The trial court's "reasons for imposition of death penalty" are as follows:

The Court sets out the following reasons for accepting the jury recommendation and imposing the death penalty in this case.

In the first stage of the trial, the defendant James Brewer was found guilty of the intentional killing of one Steven J. Skirpan. At the sentencing hearing, the burden was upon the State of Indiana to prove beyond a reasonable doubt that the intentional murder was committed in the perpetration of a robbery as set forth in the addendum to the charging indictment. The State moved to incorporate by reference, the testimony presented in the first stage of the trial, which motion was granted. The testimony showed that the defendant and his co-defendant announced to the Skirpan family that it was a "holdup", that they drew guns and demanded money and left the Skirpan home with something in excess of One Hundred ($100) Dollars. The defendant, while contending that his co-defendant actually shot the victim, testified that the victim was shot in the commission of a robbery. Accordingly, the jury was justified in finding the existence of the aggravating circumstances beyond a reasonable doubt.

In reviewing the seven possible mitigating circumstances considered by the jury, the Court finds:

I

THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONDUCT

The defendant took the stand during the sentencing hearing and the State, on cross-examination, established that he had been convicted in the Lake Criminal Court in 1975 of Assault and Battery With Intent to Commit Robbery and also with Entering to Commit the Felony of Theft. The jury was instructed that these matters were admitted for impeachment only and not as aggravating circumstances.

In reviewing the pre-sentencing report which was not available to the jury, the Court found that the defendant was committed to the Indiana State Farm for one (1) year on each of the above counts under the terms of the Minor Sentencing Act and that said terms were served concurrently. The defendant further testified that he was convicted of Auto Theft and the pre-sentencing report indicated that conviction was in Tippecanoe Superior Court and that the defendant was sentenced to 92 days on the Indiana State Farm. The Court further found from the pre-sentencing report that the defendant had a rather lengthy juvenile record including several commitments to Indiana Boys' School.

The report reflects that the defendant was first committed to Indiana Boys' School on the 6th day of March, 1968, for being incorrigible and that he was returned to the institution as a parole violator on the 5th day of February, 1969, for truancy, theft, and possession of a dangerous weapon and was again released after serving 154 days. Defendant was again returned to the institution as a parole violator on the 3rd day of December, 1970, for aggravated assault and battery and again released after serving 176 days. On the 20th day of January, 1972, the defendant was returned to Indiana Boys' School for the fourth time for aggravated

ing therein his reasons for fixing the death penalty, and we have reviewed those findings and reasons along with the evidence in the cause. An examination of the entire

assault and possession of a deadly weapon and served 189 days before his final release from the institution.

As hereinbefore indicated, this lengthy juvenile record was soon followed by the auto theft conviction in Tippecanoe County and then the two felony convictions here in Lake County. The felony records alone are sufficient to constitute a significant history of pre-criminal conduct.

II

THE DEFENDANT WAS UNDER EXTREME MENTAL OR EMOTIONAL DISTURBANCE WHEN HE COMMITTED THE MURDER

There was no evidence of any mental or emotional disturbance. The defendant testified that he had been employed full-time at Harrison Metal Company for some 18 months as a burner and, in fact, intended to go to work the morning after the killing. Further, the defendant testified that he and his co-defendant had decided to commit the robberies on the day before.

The Court had the defendant examined after the trial by one Dr. Manuel J. Vargas for the purpose of determining his intelligence quotient. His full scale intelligence quotient when tested with the Wechsler Adult Intelligence Scale (WAIS) was 76. Although this is within the dull normal to borderline range, it cannot be said to constitute extreme mental or emotional disturbance.

III

THE VICTIM WAS A PARTICIPANT IN/OR CONSENTED TO THE DEFENDANT'S CONDUCT

The evidence was that the victim was unknown to the defendant. The robbery of the Skirpan home was one of several random robberies committed by the defendant on this day. The defendant and Kenneth Brooks posed as policemen to gain entry to the home and when the victim asked to see a warrant, he was killed.

IV

THE DEFENDANT WAS AN ACCOMPLICE IN A MURDER COMMITTED BY ANOTHER PERSON AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR

The defendant was charged jointly with one Kenneth Brooks. The father of the victim was able to identify Kenneth Brooks as one of the two people who committed the robbery. He testified that Kenneth Brooks was not the one who shot and killed his son but that it was the other man. The State, by strong circumstantial evidence, was able to show that the other man was defendant, James Brewer. However, the father of the victim also testified that Brooks had a revolver and Brewer an automatic. Expert testimony showed that the bullet removed from the victim could not have been fired from an automatic. Further, when James Brewer testified during the sentencing hearing, he said that Kenneth Brooks fired the shot that killed the victim. The jury was instructed that when two or more people unite in a commission of a crime, each is criminally responsible for the actions of the other in the commission of that crime.

If we were to assume for the purpose of this provision, that the defendant, James Brewer did not fire the fatal shot, the jury would still be justified in rejecting this as a mitigating circumstance. The evidence was that this was only one of several robberies committed by Brooks and Brewer on that date. James Brewer admitted that he entered the Skirpan home with a loaded gun with the intention of committing robbery, that after the victim was shot he proceeded to ransack the home for money and that upon leaving, he and Brooks divided the money equally. Brewer further testified that the pair continued to commit other robberies the same night after the incident and that later when the police were chasing them, he fired at the police car. In the robberies testified to during the trial, there were repeated references of threats to kill made by Brewer. The Court, of course, has no way of knowing whether the jury found beyond a reasonable doubt that defendant James Brewer fired the fatal shot. But even if a jury had some doubt about that, certainly there was no evidence that his participation was "relatively minor."

V

THE DEFENDANT ACTED UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON

There was simply no evidence that the defendant, James Brewer, was under substantial domination of another person.

VI

THE DEFENDANT'S CAPACITY TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENT OF THE LAW WAS SUBSTANTIALLY IMPAIRED AS A RESULT OF MENTAL DISEASE OR DEFECT OR OF INTOXICATION

The defendant, JAMES BREWER, did not file a plea of insanity nor did he file a plea alleging lack of comprehension. He did testify that he was high on drugs on the night in question. However, he further testified that he knew what he was doing and could have controlled himself if he had wanted to. He testified that he and Brooks decided the night before to commit the robberies on that date and that he entered the Skirpan home with a loaded gun for the purpose of committing a robbery. As hereinbefore indicated, the defendant's intelligence quotient is within the dull normal to

record discloses that it clearly supports the conclusion that the imposition of the death sentence was determined by the nature of the offense and the character of the defendant. Accordingly, there is no basis for saying that a reasonable person could not find Defendant's sentence to be appropriate to his offense and character. Such sentence, therefore cannot be said to be based upon capricious or arbitrary considerations or manifestly unreasonable.

Since 1972, we have vacated death sentences in eight (8) cases. In *Adams v. State*, (1972) 259 Ind. 164, 165, 284 N.E.2d 757, 758 (opinion on rehearing) it was in response to the holding in *Furman v. Georgia* which left the constitutionality of the statute under which he was convicted and sentenced uncertain. Six of the other cases,[4] came before us following an amended statute and the decisions in *Woodson v. North Carolina, supra, Gregg v. Georgia, supra, Proffitt v. Florida, supra, Jurek v. Texas, supra*, and *Roberts v. Louisiana*, (1976) 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974, *reh. denied*, 429 U.S. 890, 97 S.Ct. 248, 50 L.Ed.2d 173.

In *State v. McCormick*, (1979) Ind., 397 N.E.2d 276, we allowed an interlocutory appeal and held that to permit the State to seek the death penalty, for a count of murder, by virtue of aggravating circumstances consisting of the defendant's alleged murder of another person in an unrelated incident, for which he was under indictment but had not yet been tried, would be a denial of due process. Under such circumstances, he would be prejudiced by being tried on two separate, unrelated charges before the same jury. In each of those cases following *Adams*, the sentence was ordered vacated because the standards and guidelines were absent. They have since been provided, however, as hereinbefore related, and we hold the statute and procedures aforementioned and the sentence of death imposed thereunder upon the defendant to be constitutional under the pronouncements of the Supreme Court of the United States in those cases last mentioned.

ISSUE III(C)

[11] Defendant next asserts that the constitutional proscriptions against cruel punishment preclude inflicting the death penalty upon one whose role in the crime was that of accessory, as opposed to principal. In support of this contention, he cites *Lockett v. Ohio*, (1978) 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, and particularly

borderline range. That this alone would not constitute a mental disease or defect.

After the trial, the Court had the defendant examined by Dr. Manuel J. Vargas, Ph. D., a licensed psychologist, who said of the defendant, "He simply acts on feeling and impulse. He appears to live pretty much on the moment without thinking ahead nor looking much behind. Consequently, he tends not to learn from his experiences." A copy of this report is attached hereto.

VII

ANY OTHER CIRCUMSTANCES APPROPRIATE FOR CONSIDERATION

The only other circumstance that the jury might have possibly considered in mitigation was the fact that the defendant is only 21 years of age and that his mother died when he was 11 or 12 years old. In view of the entire record, this was of minimal importance and certainly could not have been considered significant enough to outweigh the aggravating circumstance. The fact that defendant was of a minority race was of little or no significance in view of the fact that three of the jurors including the foreman were of the same minority race as the defendant. The affects of the limited intelligence of the defendant is well countered by his "street wisdom" and certainly cannot be considered a mitigating circumstance. His manipulation of the police and his alibi witnesses in the fabrication of his alibi during the trial stage reflects a calculating mind that tends to negate the low intelligence quotient score.

IN CONCLUSION, the Court finds the aggravating circumstance ruled upon by the State to have been proven beyond any doubt whatsoever and that there simply was no evidence of any mitigating circumstances to affect it. Accordingly, the Court finds the jury recommendation to be proper and lawful and that the Court has a duty to follow such recommendation.

4. *French v. State*, (1977) 266 Ind. 276, 362 N.E.2d 834; *Bond v. State*, (1980) Ind., 403 N.E.2d 816; *Fair v. State*, (1977) 266 Ind. 380, 264 N.E.2d 1007; *Gaddis v. State*, (1977) 267 Ind. 100, 368 N.E.2d 244; *LaMar v. State*, (1977) 266 Ind. 689, 366 N.E.2d 652; *Murphy v. State*, (1977) 267 Ind. 184, 369 N.E.2d 411; and *Norton v. State*, (1980) Ind., 408 N.E.2d 514.

the separate opinion of Justice Marshall which was especially critical of a system that did not distinguish "between a wilful and malicious murderer and an accomplice to an armed robbery in which a killing unintentionally occurs. • • • and turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants." (Emphasis added).

The *Lockett* judgment, although it reversed the judgment of the lower court to the extent that it had sustained the imposition of the death penalty as to Sandra Lockett, did not hold that the Ohio statute was deficient because it permitted the death penalty for felony murder to be inflicted upon others than those who dealt the death blow. Rather, the statute was overturned because it made provision for consideration, at the sentence determination stage, of but a very limited range of mitigating circumstances. Excluded were age and relative culpability. In essence, the case holds only: "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." 438 U.S. 586, 608, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973, 992. Our statute has numerous provisions that would militate against the arbitrary imposition of a death sentence upon one convicted under a theory of vicarious liability. We particularly note that felony murder in and of itself is not a capital offense but becomes one only if the murder was committed intentionally and that where a defendant was an accomplice in a murder committed by another, it is expressly provided that the degree of his culpability be considered. Other mitigating factors are: the substantial domination by another, the absence of a significant history of prior criminal conduct and perhaps the most important of all, "any other circumstances appropriate for consideration." Ind.Code § 35-50-2-9(c).

That the Legislature contemplated the imposition of death sentences under circumstances such as those present in this case cannot be questioned in view of the provision that the playing of a "relatively minor" role by an accomplice is a mitigating circumstance.

Accessories are guilty of the same crimes as are their principals. We, therefore, perceive of no reason why it should be *ipso facto* inappropriate to subject them to the same penalties.

Historically, we have imposed death sentences upon aiders and abettors to both intentional murders and felony murders.

In *Neal v. State*, (1938) 214 Ind. 328, 14 N.E.2d 590, 15 N.E.2d 950, we affirmed the convictions of Neal and Marshall for murder in the perpetration of a robbery, for which crime they were sentenced to death. The facts in that case were that the defendants overtook the victim (William Bright) while the latter was in his automobile. The defendants forced Bright from the wheel and drove him out into the country. While there, the defendants removed Bright from the automobile and searched him for valuables. Defendant-Marshall then walked back to the car in order to obtain a rope to secure Bright. En route, Marshall heard the firing of four shots and when he returned, Bright was dead.

In *Hamilton v. State*, (1934) 207 Ind. 97, 190 N.E. 870, and *Witt v. State*, (1933) 205 Ind. 499, 185 N.E. 645, we affirmed the convictions of Hamilton and Witt for murder in the perpetration of a robbery. Again, both defendants were sentenced to death. Here, the facts were that the defendants entered the Standard Grocery Company headquarters in Indianapolis and announced a stick-up. Confusion erupted and shots were fired. As a result, Lafayette Jackson was killed. The cause of his death was determined to be a gun shot wound, inflicted by a bullet from a handgun. Defendant-Hamilton used a pistol during the robbery, while Defendant-Witt used a shotgun.

And in *Rice v. State*, (1855) 7 Ind. 332, and *Driskill v. State*, (1855) 7 Ind. 338, we affirmed the convictions of Rice and Driskill for first degree murder. We also upheld the imposition of a death sentence against each Defendant. The facts here were that the defendants and one other entered the Fahrenbaugh home near Lafay-

ette at night. They attempted to break into a bureau but were prevented from doing so by Cephas Fahrenbaugh. After neutralizing the other occupants of the home, the intruders drug Cephas outside and killed him. He had been shot twice with the same pistol. The Fahrenbaughs could not determine who had in fact shot Cephas.

The defendant's argument that execution of an accessory who had no intention to murder and, in fact, did not personally commit the murder can have no deterrent effect as to such murders is unpersuasive. If the commission of violent crimes can, in fact, be deterred by the rational infliction of the death penalty, reason requires that the program be administered in such manner as will deter all who have a penchant to participate in violent crimes. This, in turn, dictates that those who participate, in a significant way, be eligible for selection to serve as examples.

ISSUE IV

[12] Defendant contends that the evidence adduced at trial was insufficient, in that it did not demonstrate, beyond a reasonable doubt, that he intentionally killed Stephen Skirpan. He makes this contention in the belief that the constitutional provision under review proscribes the imposition of death sentences upon defendants whose roles were accessorial only. We have determined under Issue III(C), that the constitutions do permit the imposition of death penalty, notwithstanding that the conviction is based upon a theory of vicarious liability. Hence it would be unnecessary for us to consider this issue. It should be made clear, however, that Defendant's conviction can stand without resort to the accessorial concept.

This claim of insufficiency is premised upon the inability of either Mr. Skirpan or his niece, who were the sole eyewitnesses to the tragedy, to identify him as one of the assailants, together with Mr. Skirpan's misstatement, as to his height, given to the investigating officers immediately after the event. Additionally Mr. Skirpan testified that Brooks, whom he did identify, was armed with a chrome revolver, and the ballistics tests revealed that the fatal bullet had been fired from a revolver, which is consistent with Defendant's testimony that it was Brooks, not he, who shot Stephen.

Defendant's argument, however, is misplaced in this Court. It is not reconcilable with Mr. Skirpan's testimony that when he went into the room in response to Stephen's call, Brooks was in front of his companion and that it was the man "in back" who fired.

There were but two assailants present. One was Brooks. Strong circumstantial evidence presented at the guilt determination phase of the trial firmly supports a finding that the other was the defendant; and at the sentencing phase, Defendant admitted that he was the other one. It is inescapable that the defendant is the man who stood "in back," announced a hold up and fired the shot that killed Stephen Skirpan, unless Mr. Skirpan's testimony is determined to be unworthy of belief. His credibility was a matter for the jury to determine and cannot be reassessed in this Court under the circumstances of this case. *Bentley v. State*, (1981) Ind., 414 N.E.2d 573.

ISSUE V

[13] Ind.Code § 35-50-2-9(a) (Burns 1979) provides "The state may seek a death sentence for murder by alleging, *on a page separate from the rest of the charging instrument*, the existence of at least one (1) of the aggravating circumstances listed in sub-section (b) of this section." *Id.* (Emphasis added). Defendant contends that the failure of the State to follow this procedure was tantamount to a failure to apprise him that the death penalty would be sought. He erroneously asserts that the statute mandates the charging of the aggravating circumstances as therein directed and misperceives the purpose of the directive.

The procedure urged by the statute is patterned after that provided for charging habitual offenders, Ind.Code § 35-50-2-8, which was adopted in response to our hold-

ing in *Lawrence v. State*, (1972) 259 Ind. 386, 286 N.E.2d 830. In that case, we held that the procedure of reciting the prior offenses in the charging instrument and giving evidence of them in the trial of the current offense was unnecessarily contaminating and patently unfair. The bifurcated proceedings were not fashioned as a means of apprising the defendant of his position, as defendant appears to believe. Rather, they were designed to shield him from the hazard of having the knowledge of his prior criminal record prematurely imparted to the jury. We do not have this potential problem, however, with respect to the presentation of the death penalty issue in *all* circumstances under which the death penalty is applicable, although it is present when the aggravating circumstance to be charged is either a prior murder conviction, a prior murder unrelated to the current offense, or a prior life sentence.

In this case, Defendant was charged, with Brooks, with murder and with intentional murder in the perpetration of a robbery, the latter being the first listed aggravated situation rendering the death penalty applicable under the statute. The killing and the robbery were the same *res*. They could not have been kept separate in the presentation of evidence, and there was no such need. Consequently, there was no benefit to flow to the defendant from segregating the charge of the aggravating circumstances, a robbery, from the charge of the murder.

Defendant's claim that he was not properly apprised that the death penalty would be sought simply belies the record. Arguably, the mere citation of Ind.Code § 35-50-2-9 endorsed at the top of the charging instrument may be regarded as inadequate. However, the record of the arraignment is replete with notices of the penalty sought.

We hold that the procedure utilized in this respect by the State did not prejudice the substantial rights of the defendant and was not error, in this case.

ISSUE VI

[14] Following the return of the guilty verdict by the jury, the defendant moved for a continuance of the sentencing hearing. The motion was denied because it was not premised upon any grounds and because the jury was sequestered.

[15, 16] The determination of whether to grant a continuance lies within the sound discretion of the trial court, when the motion therefor is not based upon statutory grounds. The denial of such a motion will be overturned only when an abuse of discretion is demonstrated. *Johnson v. State*, (1979) Ind., 390 N.E.2d 1005, *cert. denied*, 444 U.S. 944, 100 S.Ct. 302, 62 L.Ed.2d 312; *Works v. State*, (1977) 266 Ind. 250, 362 N.E.2d 144. In this case, the defendant presented no factual basis to the trial court which warranted a delay in the proceedings. He now contends that a continuance was required to permit an investigation of the circumstances of his prior mental problems and that the denial precluded the presentation of mitigating circumstances, in violation of *Lockett v. Ohio, supra*, and deprived him of the right to counsel. We find this contention to be without merit. The denial of a motion grounded upon sheer speculation that some benefit might flow from it cannot be said to be arbitrary or abusive. *Hardin v. State*, (1981) Ind., 414 N.E.2d 570; *Himes v. State*, (1980) Ind., 403 N.E.2d 1377.

ISSUE VII

[17] Defendant asserts that he was denied his constitutional rights against compulsory self-incrimination at the sentencing hearing, in consequence of his counsel's putting him upon the witness stand in reliance upon the trial judge's informal recommendation and assurance that he would not permit extensive cross-examination. The record, however, does not confirm Defendant's representations.

The sentencing hearing opened with a motion by the State that the evidence introduced at the trial on the issue of guilt be incorporated, by reference, as part of the record of the hearing. The motion was sustained, and the State rested. Thereupon, the defendant, who had not testified

previously, took the stand. On direct examination, he repudiated the alibi testimony and admitted to having voluntarily taken part in the robbery-murder. He added, however, that he had been under the influence of drugs at the time and that it was Brooks, not he, who killed Stephen Skirpan. In consequence of such testimony, the State cross examined Defendant extensively.

We view the decision for the defendant to take the witness stand as a tactical choice and one that we cannot fault, given the circumstances of the moment. The jury had rejected the alibi defense, and the defendant stood convicted of a particularly heinous crime and was subject to the death penalty. That neither the judge nor the jury reacted favorably to the evidence offered in mitigation does not render its tender bad judgment. There was simply no other way to submit mitigating evidence.

The trial judge, by affidavit made pursuant to Ind.R.App.P. 7.2(A)(3)(c), has acknowledged that, in response to defense counsel's request for guidance, he stated that in view of the circumstances, he appeared to have no alternative but to put his client upon the stand. This claim of prejudicial error, in itself, attests to the impropriety of a judge's deviating from his assigned role of impartial referee. However, we appreciate the frustrations of the moment, and we perceive no design by either counsel or the judge to do other than advance the best interests of the defendant. Neither do we believe that the defendant was thereby harmed.

ISSUE VIII

[18] Defendant's assignment that he was denied the effective assistance of counsel at the sentencing hearing is not substantiated by the record. The indicators of incompetence relied upon by Defendant, in the main, appear to have been either tactical decisions or matters over which counsel had no control.

[19] With regard to the claims that counsel spent insufficient time preparing for the sentencing hearing, subpoenaed no witnesses and failed to investigate Defendant's history of mental problems, we are not apprised of how Defendant was thereby harmed. The presumption is that counsel was competent, and that presumption can be overcome only by a clear showing that his actions or inactions resulted in a mockery of justice such that our collective conscience is shocked. *Deadwiler v. State*, (1980) Ind., 405 N.E.2d 521; *Robertson v. State*, (1974) 262 Ind. 562, 319 N.E.2d 833. Further, the presumption of competence is reinforced by the record herein.

[20] Defendant claims that counsel should have moved *in limine* to exclude evidence of his prior criminal activity from the sentencing hearing and objected to its admission when presented. But, such evidence was relevant at that stage of the proceeding, and there was no basis for its exclusion. Neither was there any basis for counsel to object to the State's motion that the evidence presented at the trial be made a part of the record of the sentencing hearing. The statute expressly provides for the consideration of such evidence at that stage of the proceedings. Ind.Code § 35-50-2-9(d) (Burns 1979).

ISSUE IX

[21] After the jury returned a recommendation of the death penalty, the trial court, *sua sponte* ordered that the defendant be examined by Dr. Vargas, a psychologist. The substance of Dr. Vargas' report was that the tests given to the defendant indicated that he was in the lowest seven (7) percent of the population as to general intelligence, acts on feelings and impulses, without intelligent reflection or analysis and tended not to learn from experiences.

The court considered the report, along with the evidence presented at the trial and the sentencing hearing, in arriving at its decision to impose the death penalty, and the defendant now contends that he did not have access to such report and that it was therefore error for the court to consider it. He cites *Gardner v. Florida*, (1977) 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393, but that case does not support his argument.

In *Gardner, supra*, the court held that it was a denial of due process to sentence one to death, when such sentence was based, in part, upon information which the defendant had had no opportunity to deny or explain. Additionally, in that case, the record did not contain the undisclosed information, thereby frustrating meaningful appellate review.

We first note that although the record does not indicate that a copy of Dr. Vargas' report was ever formally served upon the defendant or his counsel, neither does it reflect or suggest that he was denied access to it. Defendant and his counsel were aware that the examination had been made, and when the sentence was pronounced, the court made reference to the report, and no protest was made. The denial of such access was not assigned in the first motion to correct error but was made a point of contention in the belated motion to correct error. At the hearing thereon, counsel acknowledged that the report was available to him at the time of sentencing, although he did not recall when he had received it; and in announcing its ruling upon the belated motion to correct error, the court stated that the report had been available to defense counsel.

In *Gardner, supra*, the trial court disdained the jury's recommendation and sentenced the defendant to death, but in the case before us, the court followed the recommendation, for which there was ample basis. The reasons given by the trial court for imposing the death sentence reflect that his purpose in ordering the examination was to determine if there were circumstances that militated against the recommendation. There was nothing about the report that was prejudicial to Defendant's interest.

ISSUE X

Following the sentencing hearing, the jury interrupted its deliberations and inquired of the court as to when the defendant would be eligible for parole, if a life sentence were imposed. A conference was had between counsel and the court and a response agreed to, and given by the court to the jury. In effect, the reply advised that there was no longer any provision in our statutes for a life sentence, that the range of sentences for murder, if the death penalty was not imposed, was a fixed sentence of from thirty to sixty years and that one sentenced could earn credit for good behavior to apply against the sentence, with a maximum allowable credit of fifty percent of the sentence. The court further instructed that the sentence would be fixed by the court, and that the determination of the jury would not be binding but would be a recommendation only.

[22] This assignment is not available for review under our appellate rules, inasmuch as it was not presented at trial. *Rennert v. State*, (1975) 263 Ind. 274, 329 N.E.2d 595; *Pinkerton v. State*, (1972) 258 Ind. 610, 283 N.E.2d 376. Defendant's position that he is, nevertheless, entitled to review under our fundamental error exception to the aforestated rule is incorrect. We have recently said "fundamental error" transgressing our rules of appellate procedure "must be blatant, and the potential for harm must be substantial and appear clearly and prospectively." *Nelson v. State*, (1980) Ind., 409 N.E.2d 637, 639.

We are, nevertheless, at liberty to review questions, notwithstanding non-compliance with our rules, *Lindsey v. State*, (1976) 264 Ind. 198, 341 N.E.2d 505; and we deem this an appropriate case for such action, in view of the gravity of the matter and the need for guidance concerning a newly established procedure.

[23] Although we have condemned arguments and instructions that invite or tempt the jury to consider the ultimate sentence likely to be served, *Feggins v. State*, (1977) 265 Ind. 674, 359 N.E.2d 517; *Inman v. State*, (1979) Ind., 393 N.E.2d 767, our concern has been with cases where there was no need for the jury to have such information, because, under the law, they were not concerned with sentencing. Imparting such knowledge, therefore, could not be beneficial, and the potential for polluting the guilt determination was present. We are not confronted with that problem,

however, in the case before us. Not only had the guilt determination been made and thus could not be influenced, but also there was a definite need for the jury to have such information.

Notwithstanding that the sentence determination by the jury is not binding upon the judge, we do not regard it as a mere formality having no substantive value. If we did, error if any, in such regard could not be other than harmless. On the contrary, the recommendation of the jury is a very valuable contribution to the process, in that it comes from a group representative of the defendant's peers, who are likely to reflect, collectively, the standards of the community. The ultimate determination cannot be made in a vacuum. Hence recommendations, if they are to have relevance, must be arrived at in the light of available alternatives. Given the task of the jury at this stage of the hearing, it is altogether proper that they be fully aware of the consequences of a prison sentence as well as of the consequences of a death sentence.

ISSUE XI

[24] Defendant asserts that his punishment is cruel and unusual, inasmuch as it is excessive and irrational when compared with the sentence of sixty years imprisonment awarded Brooks, his accomplice, who, according to Defendant's testimony, was the "triggerman."

We have hereinbefore held that there was evidence to support a finding, beyond a reasonable doubt, that the defendant was the "triggerman," in which event his argument upon this point is moot.

Assuming that the evidence leaves a reasonable doubt upon this issue, there is, without question, substantial probative evidence that it was he who fired the fatal shot. The only evidence that it was fired by Brooks was the defendant's testimony given at the sentencing hearing. This testimony is subject to considerable scrutiny, considering not only the defendant's position to benefit from it but also that at the trial upon the issue of guilt, he had presented an alibi defense.

The defendant was sentenced on March 1st and Brooks more than nine months later, by a judge other than the one who sentenced Defendant and apparently upon a guilty plea. We are not privy to evidence that induced the sixty year sentence for Brooks, hence we have no basis for concluding that the sentences were not properly proportioned. Conceivably, there may have been mitigating circumstances shown that would have rendered the death sentence for Brooks unreasonable, even assuming that he was the one who fired the shot.

CONCLUSION

We find no reversible error with respect to either the guilt determination or the sentence determination.

The findings and reasons of the trial court are a part of the record.[5] We have reviewed the evidence in detail. It would serve no purpose to burden this opinion with a further recitation. That which has hereinbefore been detailed discloses that there is a rational basis under the provisions of Ind.Code § 35-50-2-9 (Burns 1979) for the sentence imposed. Said sentence, therefore, is not manifestly unreasonable in light of the nature of the offense and the character of the offender.

The judgment of the trial court is affirmed in all things; and this cause is remanded to the trial court for the purpose of fixing a date for the sentence to be executed.

GIVAN, C.J., and HUNTER and PIVARNIK, JJ., concur; DeBRULER, J., dissents with opinion.

DeBRULER, Justice, dissenting and concurring.

Appellant was convicted pursuant to the provisions of Ind.Code § 35-41-2-4(1) for the murder of Stephen Skirpan. He thereupon became subject to another trial upon

5. *See* note 3 *supra*.

allegations of aggravating circumstances for the purpose of determining whether he should be given the death sentence. A burden was upon the prosecution to prove the alleged aggravating circumstances to the jury, and ultimately to the judge, beyond a reasonable doubt.

I.

The indictment and the jury instructions informed the jury that appellant was charged with "knowingly or intentionally" killing Stephen Skirpan by "knowingly or intentionally shooting" him. The jury received an instruction based upon Ind.Code § 35-41-2-2, defining both intentional and knowing conduct. The jury returned a verdict which stated simply: We, the jury, find the defendant, James Brewer, guilty of murder. As this general verdict is consistent with a conclusion of the jury that appellant had the *knowing* mental state and with a conclusion that appellant had the *intentional* mental state, it does not provide a basis for choosing which of the states of mind the jury actually determined. Only the culpability of an intentional killing can justify the death penalty pursuant to the aggravating circumstances alleged in this case, a knowing one cannot.

In instructing the jury at the sentencing hearing, the judge informed the jury that:

"In the first stage of this trial, you found that Defendant, JAMES BREWER, guilty of the charge of Murder as *alleged in the State's charging indictment.*" (Emphasis added.)

And he informed the jury:

"In the second or sentencing stage of this trial the State is seeking the death penalty by alleging that the Defendant, James Brewer ... did ... *knowingly or intentionally kill* and murder ... Stephen Skirpan ... by ... knowingly or intentionally shooting ... him." (Emphasis added.)

And he instructed the jury that the death penalty statute defined one of the aggravating circumstances as follows:

"1.) The defendant committed the murder by *intentionally killing* the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery." (Emphasis added.)

The jury returned the following recommendation:

"The Defendant, JAMES BREWER, having been found guilty of murder, we, the Jury, recommend to the Court that the death penalty be imposed."

The judge at sentencing relied upon that verdict in stating his reasons for imposing the death penalty. He stated:

"*In the first stage of the trial, the defendant, James Brewer, was found guilty of the intentional killing of one Stephen J. Skirpan.* At the sentencing hearing, the burden was upon the State of Indiana to prove beyond a reasonable doubt that the intentional murder was committed in the perpetration of a robbery as set forth in the addendum to the charging indictment. The State moved to incorporate by reference, the testimony presented in the first stage of the trial which motion was granted. The testimony showed that the defendant and his co-defendant announced to the Skirpan family that it was a 'holdup'; that they drew guns and demanded money and left the Skirpan home with something in excess of One Hundred ($100) Dollars. The defendant, while contending that his co-defendant actually shot the victim, testified that the victim was shot in the commission of a robbery. *Accordingly, the jury was justified in finding the existence of the aggravating circumstances beyond a reasonable doubt.*" (Emphasis added.)

The sentencing judge concluded his statement with the following:

"In conclusion, the Court finds the aggravating circumstance, ruled [sic] upon by the State to have been proved beyond any doubt whatsoever and that there simply was not evidence of any mitigating circumstances to affect it. Accordingly, the court finds the jury recommendation to be proper and lawful and that *the Court has a duty to follow such recommendation.*" (Emphasis added.)

It is apparent from this record of proceedings that there has been to date no determination by the judge or jury that appellant "committed the murder by intentionally killing the victim" as required by subsections (b)(1), (e)(1) and (e)(2), of the death penalty statute. The judge made no determination himself and relied upon the general verdict of guilty to satisfy this requirement. That verdict does not contain a determination that the jury found appellant to have "intentionally" killed the victim. The judge's conclusion that the State proved the aggravating circumstance beyond a reasonable doubt cannot stand.

II.

This Court is called upon to construe and apply the aggravating circumstance alleged against appellant made pursuant to Ind. Code § 35-50-2-9(b)(1), which provides:

> "The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery."

The aggravating circumstance identified here is the coexistence of two separate and distinct culpabilities with conduct constituting two separate crimes, in and by the same person, i. e., the commission of two offenses specified. The elements of this aggravating circumstance are the following:

(1) The death of the victim as the result of inflicted injuries.

(2) The defendant had the conscious objective to inflict injury upon the victim and cause his death. Ind.Code § 35-41-2-2 (definition of intentional)

(3) The defendant had the culpability required for the underlying felony, i. e., in this case he had the conscious objective to take property from the victim. Ind.Code § 35-42-5-1 (robbery statute)

(4) Conduct satisfying the remaining elements of intentional murder and the underlying felony.

In arriving at his final conclusion that the aggravating circumstance was proven, the sentencing judge found that the jury had found appellant guilty of the intentional killing. At trial on the charge, however, the jury was instructed as follows:

> "It is a fundamental principal of law that where two or more persons engage in the commission of an unlawful act, each person is criminally responsible for the actions of each other committed in the execution of the common design or plan even though not intended as part of the original design or plan. It is not essential that participation of any one person to each element of the crime be established."

Under this legal principal, the verdict of guilty may have been arrived at without a determination that appellant personally held the conscious objective in mind to kill the victim. I agree with the opinion of White, J. in *Lockett v. Ohio*, (1978) 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973, that

> "death may not be inflicted for killings consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death ...." 98 S.Ct. at 2981.

I would add to this as well that the conduct of the defendant must be immediately connected to the deliberate taking of the life of the victim. Cf. separate opinion of Blackmun, J., in *Lockett v. Ohio, supra*. I find the Indiana statute and the position taken by Justice White to be in accord. Our statute states: "The defendant committed the murder by intentionally killing the victim...." The phrascology "by intentionally killing" serves to stress this culpability and to exclude a "knowing killing". The statute here is focusing upon the actual state of mind of the defendant at its primary and personal level and not at a vicarious level. I do not discount the support for the conclusion reached by the majority that evidence simply establishing guilt of the two offenses is necessarily and inevitably sufficient to establish the aggravating circumstance proscribed under subsection (b)(1) above. Both views of this statute are

supportable. However, in light of the irrevocable nature of the penalty involved, the Legislature should make its purpose clear, if it be that persons having no actual conscious purpose of producing death are to be executed.

I vote to affirm the conviction, but to set aside the penalty of death.

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NO. 81 5578

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES BREWER,

Petitioner,

- v -

STATE OF INDIANA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Stephen C. Bower
202 N. 3rd St.
Kentland, IN 47951
(219) 474-5121

Attorney for James Brewer

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS PURSUANT TO UNITED STATES SUPREME COURT RULE 46.

Appellant, James Brewer, moves the court for an order permitting him to proceed in this court in forma pauperis, with his appeal from the judgment of the Supreme Court of the State of Indiana entered in this cause on March 6, 1981, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of this court, and in support thereof attaches the affidavit of said Appellant.

Appellant's jurisdictional statement is being filed with this motion and Appellant's affidavit.

Respectfully submitted,

Stephen C. Bower

Stephen C. Bower
202 N. 3rd St.
Kentland, IN 47951
(219) 474-5121

Counsel for James Brewer

RECEIVED
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SUPREME COURT OF THE UNITED STATES

October Term, 1981

JAMES BREWER,

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- v -

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Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

Stephen C. Bower
202 N. 3rd St.
Kentland, IN 47951
(219) 474-5121

Counsel for James Brewer

I, James Brewer, being first duly sworn, depose and say that I am the Appellant, in the above entitled case; that in support of my Motion to Proceed on appeal without being required to pre-pay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the cost of said proceedings or to give security therefor; that I believe that I am entitled to redress; that the issues which I desire to present on appeal are contained in my Petition for Writ of Certiorari.

I further represent that when I was arrested in December, 1977, I was given a pauper attorney in an Indiana State Court. That after my conviction I was appointed another attorney to process my appeal and that my current attorney is also court appointed.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting this appeal are true.

1) Are you presently employed?

Answer: I have not been out of jail since December, 1977, and have not been employed since the time of my arrest. Prior to my arrest my last employment was with Harrison-Iron-Miller Co. in Chicago and I earned $ 800.00 per month.

2) Have you received within the last twelve (12) months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

Answer: No.

3) Do you own any cash or checking or savings accounts?

Answer: No.

4) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No .

5) List of persons who are dependent upon you for support and state your relationship to these persons.

Answer: None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

James Edward Brewer
James Brewer

STATE OF INDIANA, COUNTY OF LA PORTE: SS

Subscribed and sworn to before me, a Notary Public, in and for said county and state this 6 day of October, 1981.

Raymond J. Blevins
Notary Public
A resident of LaPorte County, IN

My Commission Expires:

February 5, 1982

Opposition

NO. 81-5578

filed 11-13-81

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES BREWER,

Petitioner,

-vs-

STATE OF INDIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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NO. 81-5578

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES BREWER,

Petitioner,

-vs-

STATE OF INDIANA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to Supreme Court of Indiana, thereby refusing to review the decision entered by that Court in Cause No. 678-S-119 on March 6, 1981.

OPINION BELOW

The opinion of the Supreme Court of Indiana is reported at 417 N.E.2d 889 and may be found in Petitioner's Appendix A. A timely Petition for Rehearing was filed and denied on August 19, 1981.

STATEMENT OF THE CASE

On January 20, 1978 Petitioner and one Kenny Brooks were indicted for murder growing out of an armed robbery. The indictment charged both with murder by shooting with a pistol held in the hands of both Petitioner and Brooks. Brewer was tried and convicted of armed robbery during which a person was shot and killed. The jury then was reconvened for a sentencing hearing which resulted in their recommendation that he be put to

death. On March 1, 1978 the court conducted a sentencing hearing and affirmed the impositition of the death penalty.

REASONS FOR DISALLOWANCE OF THE WRIT

I

PETITIONER WAS PROPERLY CONVICTED

Petitioner argues first that he was convicted as an accomplice in an armed robbery resulting in a murder without being charged that the accomplice was the murderer and alleges violations of the Eighth and Fourteenth Amendments to the Constitution of the United States. The facts simply do not support this argument. Petitioner and Kenneth Brooks were indicted and jointly charged with knowingly and intentionally killing one Steven Skirpan by shooting him with a pistol. Count two of the indictment charged them with felony murder, killing Skirpan during the commission of an armed robbery. The indictments were returned on January 20, 1978 and pursuant to a speedy trial request by Petitioner trial began on February 13, 1978. An accomplice instruction was given at trial, without objection. The decedent was shot and killed in his home by one of two men during the commission of a robbery at approximately 5:00 p.m. One of the assailants was identified as Kenneth Brooks by two eye-witnesses who were also victims. Admittedly, the witnesses could not identify the defendant as the other assailant, their testimony concerning the height and the sound of the voice of the unidentified assailant did not match such characteristics of the defendant, and defense witnesses testified that the defendant was elsewhere at the time the crime was committed. Nevertheless, there was also testimony that another armed robbery had occurred at approximately 4:30 p.m. the same day, and, at approximately 7:30 p.m. of the same day, a series of three robberies by force had occurred at an apartment house. The defendant and Kenneth Brooks were identified by eyewitnesses as the ones who perpetrated all four robberies, all of which occurred in Gary, which was the scene of the Skirpan residence. Additionally, also in Gary, at approximately 6:30 p.m. that day, the defendant and Kenneth Brooks were seen together in a bail-bond office.

Part of the money stolen in the robbery of the Skirpans was in bicentennial commemorative coins, which they had been saving. When arrested, later that evening, two silver dollars, two half dollars and two quarters, all of the commemorative issue, were found on Defendant's person. Further, when the police attempted to arrest the defendant and Brooks, they were travelling together, and the defendant shot at them.

It is apparent that Petitioners' conviction can be reconciled on the theory that he was charged and convicted as the principal and not as an accomplice. There were two assailants present; decedent's father stated that he entered the living room in response to his son's call, Brooks was in front of his companion and that the man in back fired the fatal shot. The evidence is abundant that Petitioner was present at the scene, a fact confirmed at the sentencing phase of the bifurcated trial. The evidence is such that the jury concluded that Petitioner, who was charged as the assailant, was in fact the assailant and not the accomplice that he attempts to argue in support of his petition for certiorari. Brewer v. State (1981), ___Ind.___, 417 NE(2) 889. In any event this Court has approved aiders and abettors being made equally responsible with principals in the case of Lockett v. Ohio (1978) 438 U.S. 602 as follows:

> "The States have authority to make aiders and abetters equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge."

II.

THE RULES OF APPELLATE REVIEW COMPLY WITH THE MANDATE OF THIS COURT

Petitioner next complains that the Appellate Rules for review of death sentences fail to comply with the mandates of this Court. The Indiana rules for appellate review of sentences are as follows:

"1. Availability-Court.

(1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.

(2) Appellate review of sentences under this rule may not be initiated by the State.

(3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.

2. Scope of Review.

(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Petitioners argument ignores the decision of the Supreme Court of Indiana in the case of Judy v. State (1981), ___Ind.___, 416 NE(2) 95 as follows:

"Further, our scheme provides for a procedure which enables this Court to review the imposition of the death penalty to further safeguard against the influence of improper or prejudicial factors at the trial level, and to further determine that the elements of arbitrariness and capriciousness condemned by Furman v. Georgia, supra, were not present in the sentencing decision. With the above considerations and guidelines in mind, this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures consistency, fairness, and rationality in the evenhanded operation of the death penalty statute."

In Judy, supra, Judy voluntarily waived his right to an appeal but the Supreme Court of Indiana reviewed the actions of the trial court to assure that the death penalty was not "wantonly" or "freakishly" imposed. Brewer, petitioner herein, marks only the second case in which the Supreme Court of Indiana has reviewed a death penalty conviction pursuant to the new Indiana statute adopted in response to Gregg V Georgia (1976) 428 U.S. 153 and its progeny. Lastly Petitioner argues that the sentence of death is not directly proportioned to the sentence of sixty (60) years given to Brooks and that the Supreme Court of Indiana requires that it become knowledgable of Brooks' sentencing and analyze whether the sentences were proportional. We believe that this argument has been answered against the Petitioner by this Court in the case of Gregg v. Georgia, supra where Mr. Justice White said at page 225:

> "Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment a lesser penalty or are acquitted or never charged seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder."

III.

PETITIONER HAD EFFECTIVE ASSISTANCE OF COUNSEL

Finally Petitioner argues that he was denied effective assistance of counsel at his sentencing hearing. Petitioner complains that no

motion for a continuance was made; no preparation was made for the sentencing; perjured alibi evidence was offered at trial; no investigation was made into mental problems; no evidence offered in mitigation; improper cross-examination of Petitioner; failure to present character evidence; failure to object to good-time instruction and an instruction given to the jury in the absence of Petitioner. The record clearly does not substantiate this argument by Petitioner. The record shows that trial counsel spent approximately 150-200 hours preparing for the defense of Petitioner. He participated in the taking of depositions in more than twenty instances over a seven day period prior to trial. Discussions were held concerning the possibility of an insanity or intoxication defense but both were rejected since it would have been an admission by Petitioner that he was in fact present at the scene of the murder. It is obvious that Petitioner felt that the state could not place him at the scene of the crime and therefore his best defense was a speedy trial. Petitioner was competent enough mentally to give the police a non existent-address for an alibi witness and was able to set up an alibi defense by his directions to the witnesses Kim Whitcomb and Debra McDonald. These were not acts of a below average intelligence defendant. It is obvious that when the "stack of cards" defense of alibi set up by Petitioner fell down with the verdict of guilty of murder in a little over an hour the only hope left was to place Petitioner on the stand in an effort to "humanize" him in front of the jury. Obviously the things complained of by Petitioner are tactical matters which should not be disturbed upon appeal. In any event the final burden is upon the trial judge as to whether the death penalty should or should not be imposed and the decision of the jury is advisory only. At the sentencing hearing the trial judge had all of the evidence at his disposal as well as the presentence investigation prepared by the probation officer and the testimony of Petitioner before imposing the death sentence. The reasons for imposing the death sentence were reduced to writing by the trial court and may be found in the opinion of the Supreme Court of Indiana, note 3, Brewer, supra.

We would submit that the statutes of Indiana concerning the imposition of the death penalty in all things conform to the teachings of this Court in Gregg, supra.

CONCLUSION

WHEREFORE, Respondent respectfully submits that the issues alleged by Petitioner have been correctly disposed of pursuant to state grounds, and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

By: Palmer K. Ward
PALMER K. WARD
Deputy Attorney General

Attorneys for Respondent

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